THE NORTH CAROLINA STATE BAR

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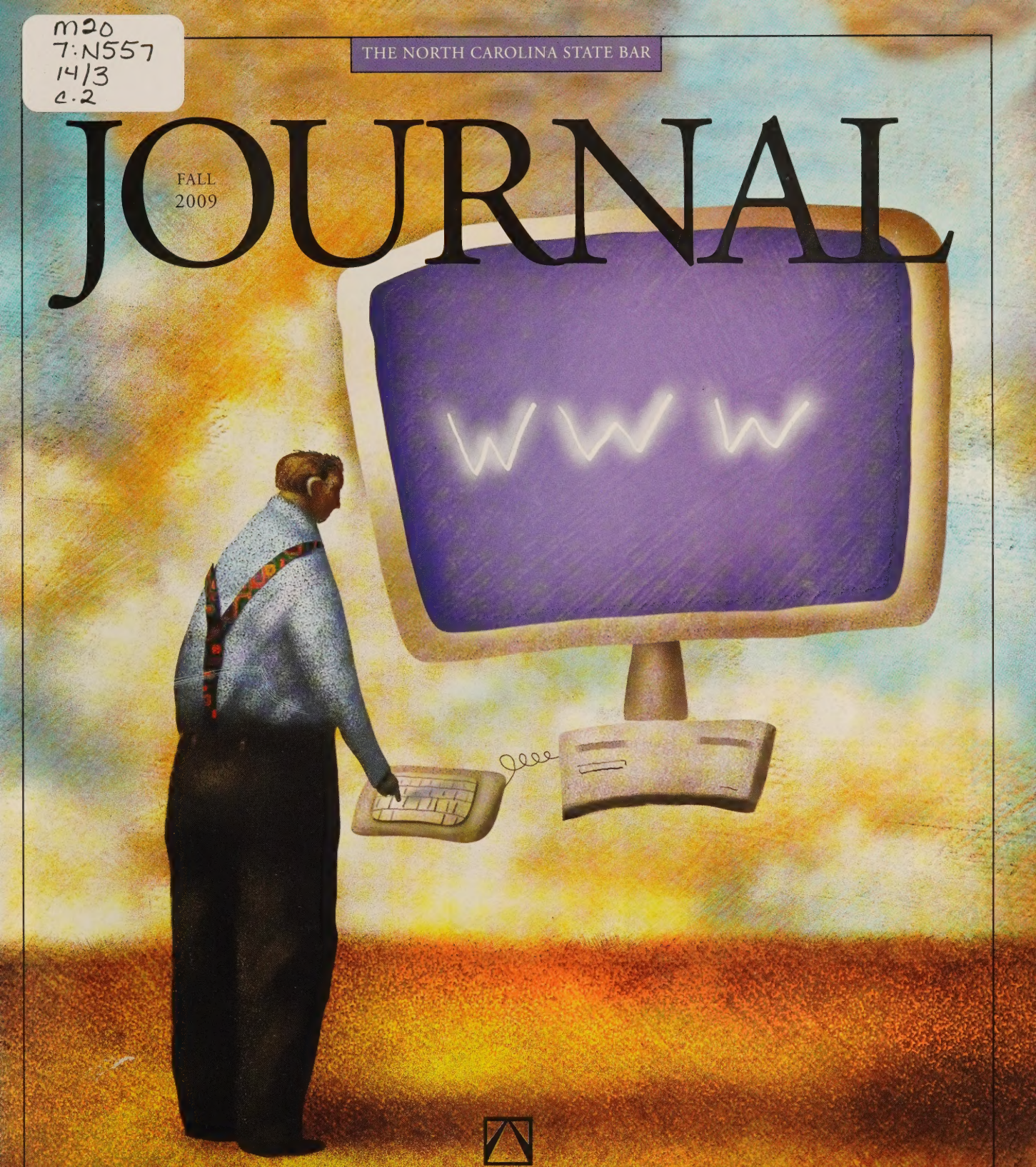
FALL
2009



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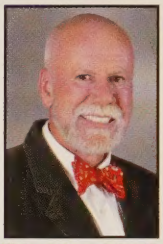

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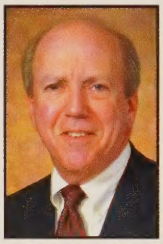

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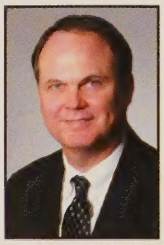

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Update Membership Information: Members who need to update their membership information must do so by contacting the Membership Department via one of the four following methods: (1) log on to the Member Access section of the State Bar's website (www.ncbar.gov); (2) mail changes to: NC State Bar, PO Box 25908, Raleigh, NC 27611-5908; (3) call (919) 828-4620; or (4) send an e-mail to lchildree@ncbar.gov. **In deciding what address to list with the State Bar, be advised that this address will be used for all official correspondence from the State Bar and that membership information is a public record pursuant to the NC Public Records Act.**

Contents

DEPRESSION, STRESS, CAREER ISSUES, AND ADDICTIONS. BELIEVE IT OR NOT, THIS IS AN UPLIFTING STORY.

Actually, there are many stories. Every one of them about someone in the legal field.

Lawyers are as vulnerable to personal and professional problems as anyone else.

Competition, constant stress, long hours, and high expectations can wear down even the most competent and energetic lawyer. This can lead to depression, stress, career problems, relationship issues, financial problems, or alcohol and substance abuse.

So where's the uplifting part? That's where we come in.

The Lawyer Assistance Program was created by lawyers for lawyers. While we started as a way for attorneys to deal with alcohol related problems, we now address any personal issue confronted by those in the legal profession.

Our message to anyone who may have a personal issue, whether a lawyer, a judge, or a law student, is don't wait. Every call we take is confidential and is received by a professional staff person. You can be confident that you're talking to the right person and that no one will know about it.

We understand what it's like to face personal problems within the profession, because we only help lawyers.

Our service is not only confidential, it's free, paid for with your yearly bar fees.

If you have a personal issue, or know someone who does, we can be the crucial first step in turning things around, a role we've played for many of your peers.

We have countless success stories we could tell, and yes, they are uplifting. But we do our work quietly, confidentially, and professionally so the stories will stay with us.

We're here for you. Visit **www.nclap.org**, call **1-800-720-7257** or email@nclap.org.

We can help if you get in touch with us.

PALS

LAP
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FRIENDS

FOR THE ISSUES OF LIFE IN LAW

Comparability and My Incomparable Experiences as President

By John B. McMillan

If I were twittering, my "tweet" for the day would report that I am at my desk with my Golden Retriever Bailey's head resting on my right foot, reassured that I have returned safely from Chicago and the ABA annual meetings. A gentle rain is falling on our newly planted lawn, and *Journal* editor, Jennifer Duncan, is pressuring me for the final version of the Journal's quarterly president's message. But this isn't a "tweet," and I am compelled to use complete sentences. So allow me to give a brief overview of what is happening at the State Bar.

At the July quarterly meeting, the council unanimously approved publishing for comment our version of Model Rule 6.1 concerning pro bono services, and you will find the text of that proposed rule in the Rule Amendments section of this *Journal.* A discussion of that Model Rule was contained in last quarter's president's message. I commend the adoption of this proposed rule as a reasoned approach to fulfilling our professional responsibility to provide pro bono services.

The members of the Program Evaluation Committee, chaired by Margaret Hunt and Henry Babb, have been working in four sub-committees to review the procedures and effectiveness of the State Bar's committees and programs. To assist with this effort, four of our past leaders have been recruited and are participating: Past-Presidents Ann Reed and Bill King, past Ethics Committee Chair Ed Hinson, and past Authorized Practice Committee Chair Colon Willoughby. We are grateful to them for their assistance. Although most of the work of this committee will be completed in October, one sub-committee will likely continue into next year.

The Distinguished Service Committee, chaired by Councilor Don Prentiss, has worked throughout the year to identify a number of individuals for the State Bar's Distinguished Service Award. The awards to these recipients have been approved by the council, and they will be recognized at the annual meeting in October. The many good works of members of the State Bar should be recognized by this organization, and that will happen this year.

Under the leadership of Facilities Committee Chair Keith Kapp, plans for the new State Bar building are proceeding on several fronts. The General Assembly passed an amendment to the statute governing the State Bar that will allow us to achieve a better mechanism for financing the construction. Councilor John Silverstein has led the team negotiating the land lease for the building at the intersection of Blount and Edenton Streets. Mary Nash Rusher has been invaluable in assisting our committee with exploring the most favorable method of financing the debt that will be required for the design and construction costs. An architectural firm has been selected and is working on the design phase of the building. Leslie Silverstein assisted in the selection process, and Tom Davis was extremely helpful with drafting the contract with the architect. We thank all of these individuals for providing us with such able assistance.

As you may have discerned by now, your State Bar relies on many people to help us get the job done. Members of the council and our staff are very talented, but they carry a full load, and it is not uncommon for us to reach out to others for assistance. I have been truly gratified by the response of all of these individuals when I have called upon them to participate.

I had intended to utilize all of this space advocating for comparability in our IOLTA program. However, the three-part article on IOLTA written by Clifton Barnes, as well as Evelyn Pursley's informative updates in this and the Summer 2009 issue, have set the stage very well for our consideration of that matter in October. I hope you have read or will read these articles.

Mr. Barnes accurately identifies the many people who have made our IOLTA program so successful over the past 25 years. They include those who initiated the effort in North Carolina, as well as those who advanced IOLTA from an op-in to an opt-out system, and now to a mandatory program. He particularly references the wisdom of Trustee Ward Hendon in advocating for the creation of a reserve fund and correctly pointing out that much of the credit for the success of IOLTA should go to leaders of the banking community, our partners in this effort. Throughout the life of the IOLTA program, the State Bar Council has appointed the very best we could find to carry out this important work. They include lawyers and bankers; they have led us well, and we are indebted to them. Former Trustees Ed Aycock, Mike Miller, and Marion Cowell have been particularly helpful in leading us through the conversion to mandatory IOLTA and have met with Evelyn Pursley and me to help facilitate the discussion surrounding comparability. Because I know he reads this column and accuses me of sucking up to folks by mentioning them by name in it, I will also thank Paul Stock with the North Carolina Bankers Association for his

assistance in these efforts. Paul is a thoughtful advocate for our banks and is a fellow member of the State Bar.

We will debate a proposed comparability rule in October as recommended by the IOLTA Board. It is currently being reviewed by a sub-committee of the Issues Committee. As with all of our rule changes, there will be ample opportunity for lawyers throughout North Carolina to provide input. Proposed rule changes are published in the *Journal* and are not adopted for submission to the North Carolina Supreme Court until after you have had an opportunity to comment.

Twenty-seven out of the 40 states that have mandatory IOLTA programs have now adopted a rule on comparability. As Evelyn reminds us, 75% of NC IOLTA accounts are held in seven banks, all of which have a presence in comparability states. If the council decides to proceed with comparability, I am confident that it will be implemented with little or no disruption to those who handle law firm trust accounts in our law firms and in our banks.

As with the implementation of mandatory IOLTA, we don't know precisely what effect adopting a comparability rule will have. In the case of mandatory IOLTA, we knew we had 75% of eligible lawyers participating in the IOLTA program and that many of the eligible lawyers who were not participating didn't have practices that involved large trust account balances. Some skeptics felt we wouldn't generate any additional revenue at all, or at least not enough additional revenue to justify going to the trouble to implement the program. Now the results are in, and while most states saw a significant decrease in IOLTA revenue in 2008, North Carolina's IOLTA income increased by 16%. Had we not implemented mandatory IOLTA, we believe 2008 revenue would have declined by 12%; this represents a 28% swing.

Before recommending comparability for North Carolina, our IOLTA Board commissioned a study by Delta Consulting Boston, LLC, a management consulting firm specializing in IOLTA program support, to "examine the technical components of interest rate comparability, apply those concepts to current and historical operating and statistical information about the North Carolina IOLTA program, and provide estimates of expected revenue changes." The conclusion reached by these consultants was that implementing comparability "should have significant positive long-term effects on IOLTA revenue, as well as some incremental benefit in the short term." Well, I like incremental benefit in the short term, but I really like significant positive long-term effects on revenue.

In the current economy we do not expect to achieve the results other states did when they caught the rising tide several years ago, but the experience of those states is worth noting. Florida moved to comparability in 2004 and its IOLTA income went from $12 million to $72 million in 2007. Texas went from $6.3 million to $20 million in that same timeframe, and Massachusetts went from $17 million to $32 million one year after it implemented comparability.

Comparability would be implemented through a revision to the administrative rules that govern the IOLTA program that would require lawyers to maintain their trust accounts at banks that agree to pay interest on IOLTA accounts equivalent to the rates paid to their other customers. If a bank has a minimum balance requirement for its other customers in order to qualify for the higher rates, the same requirement would apply to the lawyer's trust account. In other words, the bank doesn't have to do anything it wouldn't do for its other customers. Banks actively seek lawyer trust accounts and in most instances are willing to comply with comparability requirements.

When Maryland adopted comparability in 2007, Wachovia stepped up to the plate and implemented the program months before it was required to do so. As quoted in a September 10, 2007, article by Cynthia Dipasquale in the *Baltimore Daily Record*, Wachovia Regional Bank President Jim Themides said: "It was a pretty easy decision for me to make because, one, it's the right thing to do in the community, and two, it's still good business for Wachovia Bank." We believe that not only will our large national banks that deal with comparability in other states willingly accept this concept, but our fine regional and local banks will have the same attitude.

The proposed rule under consideration does not require banks to compete with each other or to pay the same interest other banks pay. It merely says that the lawyer trust account must be held in a bank that pays interest on the IOLTA account that is comparable to what it pays its other customers with similar balances.

As in the case of transitioning to mandatory IOLTA, Evelyn and her fine staff as well as our IOLTA Board will work with each bank to provide technical assistance and assure compliance. Twenty-seven states have done it, and we will be able to do it as well. The rewards are too great not to take this step.

This will be my last *Journal* message as president of this wonderful organization. I wish that all of you could have had the inspirational experiences I have had in working with my fellow officers, councilors, and State Bar staff over these past years. I can't begin to tell you how dedicated all of these people have been and are to the mission of the State Bar. I greatly benefitted from serving as an officer with Past-Presidents Calvin Murphy and Steve Michael. Past-President Hank Hankins has been an inspiration to me, and I have tried hard to advance the ball he put in play when he created the Facilities Committee to plan for the new State Bar building. He has been the quarterback in the "Three T" formation he implemented two years ago and spends a good portion of every day thinking of how best to be a leader of the State Bar.

Having spent the past 12 years on the council with President-Elect Bonnie Weyher and watching her effectively chair virtually every committee we have, and having now been a fellow officer with her for two years, let me assure you that we will be in great hands under her leadership. Vice-President Tony di Santi has been terrific in every task he has undertaken, but I especially thank him for moving forward with Rule 6.1 and comparability in IOLTA as he chaired the Issues Committee considering those topics. We have been a team that has been ably supported by Coach Tom Lunsford, Coach Alice Mine, Coach Katherine Jean, Manager Sharon Denton, and all of our fine staff. Despite the added burdens of considering Rule 6.1, comparability, distinguished service awards, and planning for the new building, the work of the Grievance, Ethics, Authorized Practice, Attorney Client Assistance, Administration, and our many other committees goes on.

The work of the State Bar is done by committees and our staff. I will admit that I

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Avoiding Ethical Traps for Law Firm Websites

By Mike Dayton

The internet is widely acknowledged to have been born in 1969, the year of Woodstock. However, not until the 1990s did the internet capture the imagination of the general public. The rapid rise in online users during that decade made it an inevitable marketing avenue for law firms.

Law firm websites made their first formal appearance on the State Bar's ethics radar in 1996, when the Ethics Committee issued RPC 239 (October 18, 1996). That opinion ruled law firms could display information about their firms on a "world wide website on the internet." The Bar concluded that many of the same ethical rules that govern print ads or radio and television commercials also applied to online marketing efforts. The current provisions are contained in Rules 7.1 through 7.5.

The online world continues to create new ethical challenges, and the Bar has done its best to keep pace through its rules and ethics opinions. If your firm is now online, here are some pointers to help you avoid ethical headaches.

Just the facts, Jack. Be sure that what appears on your website is factually correct. Rule 7.1, the guiding star for lawyer advertising, states that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." A communication is deemed to be false or misleading if it "...contains a material misrepresentation of fact or law...." It is the seemingly innocent factual statement, not the questions of law, that may cause problems, according to one Bar official. Suppose your site states: "We answer all of our phone calls within 24 hours." Your firm may be able to demonstrate this is true if you use an around-the-clock answering service. Even so, be careful about making statements like that unless they can be verified.

If you include video clips, or even photographs that portray fictional persons or events, be aware that the same rules that apply to written text also apply to visualizations. For instance, if your website video is a dramatization, you must say so. *See* Rule 7.1(b). Avoid images, such as the handing over of a million-dollar check to a client, that might create unjustified expectations.

Avoid implied comparisons. Rule 7.1 states the comparison of a lawyer's services with those of his or her colleagues may be

considered false and misleading "unless the comparison can be factually substantiated." Thus, a statement such as "service is our #1 objective" is not likely to raise objections, but eyebrows may be raised when you proclaim, "we are North Carolina's most experienced law firm in food poisoning claims." Perhaps your firm has handled a class action and represented 10,000 plaintiffs nationwide. But that statement invites comparison with other firms. If you can't back it up, think twice about including it on your site.

Take a close look at client endorsements. Quotes from satisfied clients may be the very thing that convinces a new client to sign up with your firm. That's why so many firms include them on their websites. General or "soft" endorsements typically do not raise ethical questions—for example, "XYZ Law Firm treated me with respect" or "They answered my phone call immediately" or "I needed help and they were there." The more specific endorsement of "XYZ Law Firm got me $300,000 for my car accident" is skating on thinner ice. The problem is one of unjustified expectations. Comment 3 of Rule 7.1 states: "An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case."

Rules about "no fee unless we recover" statements. Lawyers who handle personal injury matters on a contingent fee basis frequently include no-recovery, no-fee statements on their websites. Under ethics ruling 2004 FEO 8, statements like those may be potentially false or misleading if you don't charge a fee when there is no recovery but clients still have to repay costs. The bottom line from that ruling: "If the lawyer does not invariably waive the costs advanced, the advertisement must state that the client may be required to repay the costs advanced regardless of success of the matter."

Know your Super Lawyer rules. Congratulations—you've been named a Super Lawyer. Under 2007 FEO 14, you can advertise inclusion in a Super Lawyers listing on your website, subject to a few simple guidelines. Most importantly, do not simply state you're a "Super Lawyer" as that could be seen as an unsubstantiated comparison prohibited by Rule 7.1(a). Instead, make it clear the Super Lawyer designation is a listing in a publication by indicating the publication name in a distinctive typeface or italics, include the year you were honored, and link to the criteria for inclusion on the Super Lawyer website.

A word about advertising verdicts and settlements. For potential clients seeking an attorney, there may be no better selling point than your firm's past successes. The Bar is still sorting out the guidelines on this issue. In 2000 FEO 1, the Bar's Ethics Committee concluded that the posting of verdict and settlement amounts on websites had the potential to create an unjustified expectation about the results a lawyer could achieve. In 2000 FEO 1, the Ethics Committee ruled that putting verdicts or settlements in context lessened the likelihood that a website visitor would be misled. But the context requirements proved difficult to

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Social Networking—Blogging, and Facebook, and Twitter, Oh My!

By Michael Duncan

This article on using social networking to market a business was not written specifically for lawyers. Although the advice is topical and useful, lawyers are reminded of their paramount duties under the Rules of Professional Conduct. The prohibitions on in-person solicitation and targeted mail may, in particular, limit the use of social networking for marketing a law practice. Before engaging in social networking as a marketing tool, contact ethics counsel at the North Carolina State Bar for advice.

Facebook, Twitter, blogging…in the past year, these social networking tools have shifted from kid stuff to major marketing tools. If you're wondering how to use these tools to connect with potential clients, you're not alone.

Dave Cutler/Images.com

Social media is an easy way to connect with people on a personal level. If your website serves as your online business card, then social media can be a form of online greeting card, providing you with a more personal presence on the internet and allowing you to interact with clients individually.

When done properly, social media is a fun, targeted way to reach your audience on a personal level with a wide range of positive results for marketing, search engine rankings, and traffic.

Don't stumble blindly into social networking for your business. Whether you're blogging or using social networking sites like Facebook and Twitter to connect with your clients, you need a strategy. Decide what you want to accomplish through social media. Connection with customers? Web site traffic? Reputation management? Your ultimate goal will determine the tactics you use and the networks you join. Here's a basic overview of the most popular methods and how to use them.

Blogging

If you want to inform your customers with industry and company news and you're prepared to devote time to quality content development, then you should start a blog. Adding a blog to your website provides a personal voice to your business and allows you to offer your audience useful information. It can even help your website rank better in search engines. It's also the most time consuming method of social media and the most difficult.

Before starting a blog, come up with a plan. What kind of information do you want to provide to your visitors? Will you have time to write original content for your blog several times a week? Are you or someone on your staff comfortable enough writing to develop quality content? If the answer to these questions is yes, then a blog is a perfect start for your social media campaign.

The key to building a successful blog isn't promotion; it's quality content development. Your blog is not the place to sell your services. It's a place to share information that is helpful and interesting to your readers. Promotion can help you build a network, though. Promote your blog to your client base by adding it to your email signature, website, and promotional materials. Connect with other bloggers in your industry by linking to them, commenting on their posts, and submitting your content to social

bookmarking sites like Digg and StumbleUpon. Just remember, focus on the content to keep readers coming back for more.

If you're ready to build your blog, keep these guidelines in mind: don't blog from an outside website like WordPress or Blogger. Your blog should be a part of your website (http://www.yourdomain.com/blog), not part of an outside website (http://yourdomain.blogspot.com). By placing the blog on your website, you're placing all of the content from your blog directly on your site. Search engines love websites that are updated frequently, so blogging directly on your site allows you to reap the search engine benefits of keyword-rich blog content. Write fresh, original posts regularly (at least three times a week), and try to keep them under 500 words each for better readability for your visitors.

Facebook

If you want to create a social media hub for your business with content, photos, video, and networking capabilities, a Facebook page is what you need. Facebook is the largest social network on the web. The website boasts more than 200 million active users with more than half of them logging on at least once a day. And it's not just kids, either. More than two-thirds of users are out of college, and the fastest growing demographic is 35 years and older. If you're not already a part of this huge community, now is the time to join.

The way Facebook differentiates between people and businesses can be confusing. Facebook does not allow businesses to build personal profiles. You have two options for promoting your business: building a business profile page and creating a group for your business. Use the page as a central hub for information about your business on Facebook, and use the group as a forum where fans and friends can interact with you and each other.

Remember, profiles are for people; pages are for businesses. Your business page will need to be connected to a personal profile if you want to reap all of the benefits of Facebook. Build your personal profile first, and keep it business appropriate. Then connect a business page to your profile.

Facebook is people oriented. The only way it's going to work is if you're willing to get involved in the conversation. Build a personal profile, seek out friends in your target audience, and participate in groups related to your profession.

For more information on Facebook pages, read Facebook's help section for businesses at http://www.facebook.com/advertising/#/advertising/?pages.

Twitter

To converse with your customers and monitor what they're saying about you in real time, consider Twitter. Twitter (http://www.twitter.com) has quickly grown to become one of the most powerful social networking tools on the web. According to data compiled by Neilson Online, Twitter reaches more than 13 million people in the United States each month. It's also the social networking tool that many novices have the hardest time using. Twitter allows users to broadcast short, 140-word messages to other users who "follow" them.

It's no use if your target demographic isn't using Twitter. Do some research to

determine if you can reach your audience through Twitter. Use Twitter Search (search.twitter.com) to find people talking about your products or services. TweetScan (www.tweetscan.com) notifies you when your services or keywords are mentioned on Twitter, and Twollow (www.twollow.com) allows you to auto-follow people who are talking about your services. For instance, if you specialize in traffic violations, you should set a TweetScan alert for relevant keywords such as "speeding ticket" in your area. Using Twollow, you can automatically follow users who are talking about traffic violations. Following them will get you noticed, but they'll only follow back if you're sharing interesting information, so don't wait until you have a network to start tweeting.

Initiate conversation about your industry, offer tips, listen to what people are saying about your company, and be proactive in responding to @ replies and direct messages. Offer information that customers and other people in your network will find interesting—not just marketing and PR speak. Don't toot your own horn too much, or bombard users with links and repetitive marketing messages. Just like any conversation, these common mistakes will make you boring or annoying to followers.

This is by no means a complete list of social media sites that can help promote business. There are hundreds of other sites and social networking tools. Social media marketing is like any other marketing: different tactics work for different businesses.

Spend some time exploring these websites to determine if they can work for you. Come up with a strategy for how to implement these tools and integrate them with your current marketing efforts. Be sure you're using a network that your target audience is using.

If you're unsure of where to begin, internet marketing consultants can help you come up with a strategy, set up your profiles, and learn to use these tools effectively, but in the end your success depends on your engagement. Designate someone within your company as the online "face" of your brand. Social media works best when it's used to connect people with people. Use a real person as the online persona of your brand instead of a faceless logo. Your online profiles are an extension of your company, so make sure your company's online persona positively represents your brand.

After you've developed a strategy, built your profile, and joined a network, all that's left is the conversation. Initiate conversation with your customers about your industry and your brand, listen, and respond promptly to @ replies, blog comments, wall comments, and direct messages. Avoid excessive marketing and promotion of your brand, contribute to the community, and be interesting! ■

Mike Duncan is the CEO and creative director of Sage Island, a Wilmington marketing agency. Sage Island began as a custom programming company, but quickly expanded into commercial web design and eventually full-service marketing. Today, Sage Island has built a strong reputation through award-winning designs, brand strategy, and internet marketing services, including search engine optimization and pay-per-click advertising. Mike can be reached at mduncan@sageisland.com, www.sageisland.com.

Law Firm Websites (cont.)

meet. Among other things, firms were required to list favorable and unfavorable results within a specified timeframe, as well as the difficulty of the cases and whether there was clear liability.

This year, the Ethics Committee took a second look at the 2000 ruling. 2009 Formal Ethics Opinion 6, adopted by the Council on July 24, 2009, drops the most troublesome portion from the 2000 opinion—the requirement that favorable and unfavorable results be reported. The ethics ruling allows a case summary section on websites "if there is sufficient information about each case included on the webpage to comply with Rule 7.1(a)." The opinion states: "The summary should reference the complexity of the matter; whether liability and/or damages were contested; whether the opposing party was represented by legal counsel; and, if applicable, the firm's success in actually collecting the judgment. Providing specific information about the factual and legal circumstances of the cases reported, in conjunction with the inclusion of an appropriate disclaimer, precludes a finding that the webpage is likely to create unjustified expectations or otherwise mislead a prospective client."

Be clear when advertising your firm's age. It's not uncommon for lawyers in a firm to add their years of experience together as a marketing strategy. When a firm says "put our 30 years of experience to work for you," potentially you have three lawyers in the firm that have each been licensed and practicing for ten years. In ethics ruling 2004 Formal Ethics Opinion 7, the Bar declared it was misleading to advertise the number of years of experience of the lawyers with a firm without indicating that it was the combined legal experience of all the lawyers. The solution is an obvious one—simply state you're talking about "combined legal experience" when you total the years of practice of the firm's attorneys.

Register your trade name. Rule 7.5(a) permits a law firm to use a trade name, provided it doesn't imply a connection to a government agency or a charitable legal services organization and provided the name is not false or misleading. In ethics opinion 2005 Formal Ethics Opinion 8, the Bar concluded that the law firm's URL—the website's unique internet address—could qualify as a trade name. If the URL is more than a minor variation on the official firm name, it has to be registered with the State Bar. SmithJonesLaw.com, a variation of the firm's actual name, would not have to be registered, while a name such as NC-Worker-Injury-Center.com would. Instructions for registering the trade name can be found on the Bar's website at www.ncbar.gov/resources/forms.asp. ■

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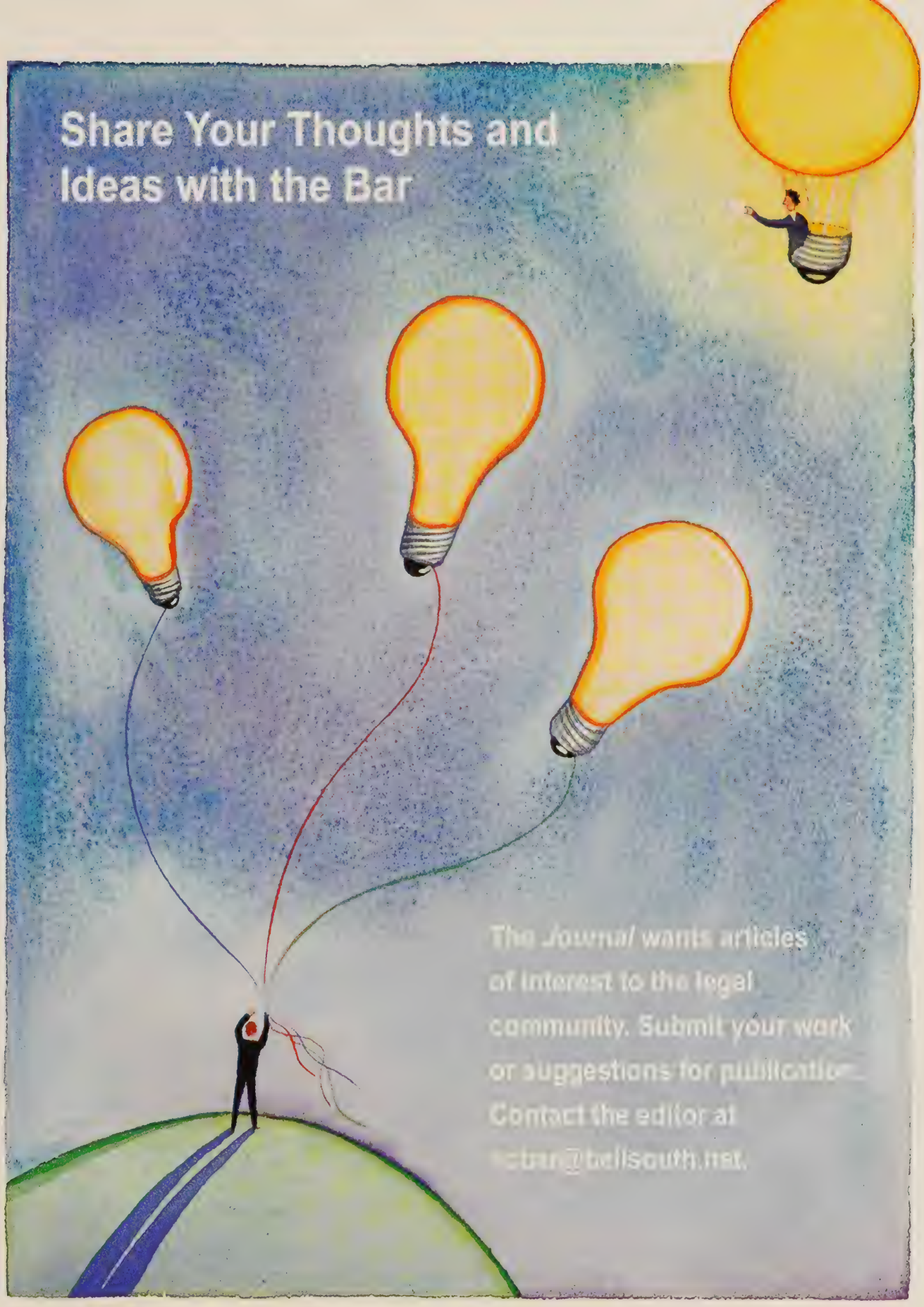
Attorneys who have questions about their website content can contact the State Bar at 919-828-4620.

Share Your Thoughts and Ideas with the Bar

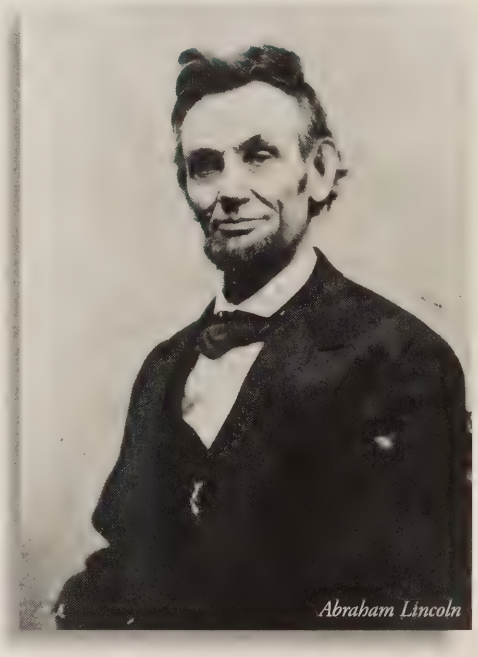


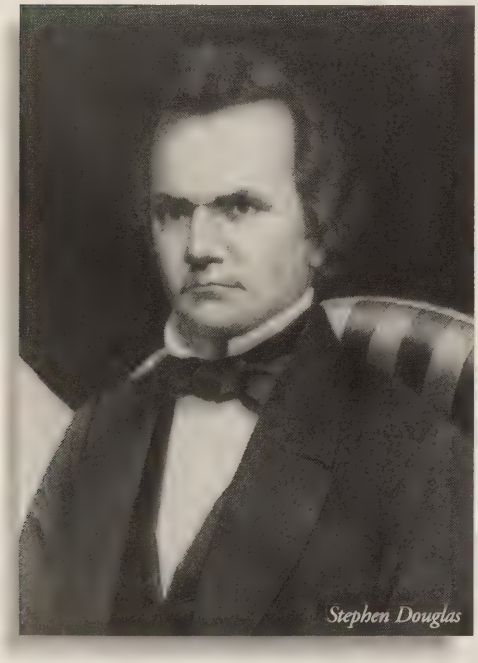
The *Journal* wants articles of interest to the legal community. Submit your work or suggestions for publication. Contact the editor at [illegible]@bellsouth.net.

The Lincoln-Douglas Debates

By R. D. Douglas Jr.

The Civil War in the 1860s had been in the making for 40 years before shots were fired. The Lincoln-Douglas Debates of 1858 reviewed all these years and focused on the tensions and differences that clouded the minds of our citizens, and finally tore our nation apart.


Abraham Lincoln


Stephen Douglas

Two things might be considered before looking at the debates; first, the background of the two speakers, and second, the rules and conduct of the debates.

Lincoln, originally from Kentucky before practicing law in Illinois, had educated himself by reading everything he could find. He served two years in the United State House of Representatives, and then returned to his middle Illinois law office. He was not well-known throughout the state. However, when he was nominated to run against Douglas for the United States Senate, Douglas wrote to a friend, "Mr. Lincoln is the strongest man of his party—full of wit, facts, and dates, and the best stump speaker with his droll ways and dry jokes in the West. He is as honest as he is shrewd, and if I beat him, my victory will be very hardly won."

We all have mental pictures of tall, thin, bearded Abraham Lincoln. Stephen A. Douglas, born in Vermont, raised in upstate New York before going to Illinois at the age of 19, was 5'5", large head, stocky, but so full of energy that a newspaper called him "The Little Giant," a name by which he became nationally known.

When Daniel Webster, Henry Clay, and John C. Calhoun had left the Senate floor, Douglas was considered the leading speaker in the United States Senate. He had been a senator for 12 years before the debates and was one of the nation's leading Democrats. He was chairman of the Committee on Territories, which oversaw a variety to topics related to the territories, including their admission as new states.

I will try to compare the 1858 Debates with what we have come to know as debates in our own time. I have watched numerous confrontations called debates over the last 60 years. Each has had the same format. The candidates appear on opposites sides of the room facing the television camera. A panel of several journalists or a single political pundit asks a series of questions considered to be important to the television audience. The candidate has two and one-half minutes or three minutes to answer; then the question goes to other candidate. Neither candidate has time to give his reasons for his position on the issues; he has no chance to question his opponent's reasoning. In some of these

political arenas, each speaker may be given two minutes to rebut the other's answer, usually an expected contradiction, but little more. At the end, you know the stand of each on issues already promoted by the media. On some occasions, I have wondered at the logic of the candidate, how he came to his stated conclusions, but I have learned nothing of his character, his ability to compromise, or where he might stand on future issues which may arise to affect me.

When Kennedy debated Nixon in 1960, a panelist asked questions for a two and one-half minute answer. The Carter-Ford Debate allowed three-minute responses. When Regan debated Carter and then Mondale, Regan was given two minutes to answer.

The 1858 Debates were wonderfully different. The first speaker (rotated on each of the seven confrontations) spoke for one hour. He chose his own topics, gave his position on each, and his concern that the other side might prevail. The other candidate then had one and one-half hours to propose his own beliefs, answer his opponent, and paint pictures of his hopeful success and the terrible consequences of his opponent's election. The first speaker then had thirty minutes of rebuttal or to introduce still other ideas.

No one told either speaker what to cover in his allotted time. Unlike our modern debates, where nearly every viewer has watched the previous debate, few in the 1858 audiences had been present in the earlier confrontations. Thus a speaker, remembering the crowd's reaction to a particular exposition, decided what to repeat or whether to be silent on such subjects.

The audience listening to the debates was usually about 10,000 settlers, farmers, and tradesmen, often bringing their families and doubling the size of the towns where the debates were taking place. They looked forward to three hours of high entertainment. The physical strain on the speakers was enormous. With no electric devices, the debaters spoke from a raised platform or a balcony to crowds from 10,000 to 20,000 people standing or sitting in an open field. A light rain fell on one of the seven encounters; slight but steady winds at two other towns, making speaking more onerous. Douglas spoke in what the newspapers called a deep, sonorous voice. Lincoln had a high voice, but it carried well.

If one speaker believed his opponent had a position on some subject unpopular in that area, he would repeat at future debates to force his opponent to repeat the stand on the question. Both knew when to rephrase the other's questions or statements or when to ignore them.

Now we will consider the historical background of the debates. Back in 1820, as new territories were seeking statehood, there was open talk of dissolution of the Union. Southern states, roughly equal in number to anti-slave states, feared an unbalanced nation. Webster, Clay, and Calhoun helped work out the Missouri Compromise of 1820. Missouri came in as a slave state, but the northern line of Missouri was projected westward. New territories or states south of the projected line would allow slavery, north of the line, slavery would be forbidden. This appeased the South, satisfied the North, and the tensions subsided. All of Kansas, part of Colorado, all of the Mexican lands, and an area of Spanish California were south of the line.

In 1848, the Mexican War was coming to a close and new lands, taken from Mexico, brought a renewal of concern. Congressman David Wilmot proposed introducing a proviso that slavery would not be allowed in any lands taken from Mexico. This Wilmot Proviso never actually passed in Congress, but for years both the North and the South saw it as a possibility. Then California, ceded by Spain, enacted a slave-free constitution and asked for statehood, including its lands south of the Missouri Compromise line.

In 1850, furious talk arose concerning the dissolution of the Union, and a new compromise made its way through Congress, taking in California as a free state, prohibiting slave trading in the District of Columbia, and not actually prohibiting slavery in some of the territories.

In 1854, the huge land of Nebraska was about to be organized as a territory. Senator Douglas helped write and pass the Kansas-Nebraska Act. The new territory would be divided into Kansas and Nebraska, each to enact its own territorial constitution and then later to vote on a state constitution. To Douglas, this was a vindication of his great devotion to popular sovereignty. Kansas, south of the Missouri Compromise line, and all of Nebraska, north of the line, were allowed to vote on the slavery issue. The Kansas-Nebraska Act actually violated the Missouri Compromise, which had predesignated the slavery status of each of these territories. Consequently, the Kansas-Nebraska Act repealed the Missouri Compromise.

Before the debates started, the two candidates for the Senate from Illinois had well-defined their basic political positions.

Lincoln had stated that he would not attempt to disturb slavery in the states where it was already allowed. The Constitution was silent on slavery. The Bill of Rights amending the Constitution to ease the fears of the Founding Fathers stated in Amendment 10 that all powers not specifically given to the federal government would remain in the states. Lincoln insisted that slavery must be prohibited in any of the new territories, both when recognized as a territory and before becoming a state.

Douglas set his heart on popular sovereignty; that each new territory had the right to vote on its status, with its own constitution, which would allow slavery or prohibit it. Then when the territory asked for statehood in the Union, it could vote on its own state constitution. Douglas said that popular sovereignty was the very essence of democracy, allowing the people to make their decisions.

Lincoln constantly expressed the belief that slavery was morally wrong. He said on several occasions that he would not disturb slavery in the slave states which presently allowed it—it would eventually die of itself in due time—but there must be no extension of this great wrong.

Douglas, who frequently expressed his opinion that slavery was an abomination to both races, felt that in a great democracy this issue must be decided by the people themselves in secret ballot. He said, "Southern men have consciences, are civilized, they know the difference between right and wrong as well as we do, and they will have to account to God and posterity, not to us in 1858."

There is one logical conclusion which neither speaker seems to have explained. Why was a vote by a territory so important? If a new territory were to allow slaves, integrate slavery into its customs, its work procedures, and its moral thinking; then when ready for statehood, it would in all likelihood become a slave state. Conversely, if there were no slaves for three or four years in a territory, it would be very unlikely that the new state would decide it must now have slaves. Neither Lincoln nor Douglas presented this argument. As observed elsewhere in this paper, Douglas claimed that in the absence of governmental power in the Constitution, each state could vote on this issue. Therefore in such absence of Constitution power over territories, each territory could vote on the issue. This was democracy.

Lincoln, never actually demanding government control over slavery, insisted that as to territories, the Constitution did not refer to slavery, and that meant that the federal government had absolute right over the territories.

One other bit of history made Douglas' task harder, and Lincoln seized on it and even Democrat President James Buchanan declared war on Douglas.

Kansas as a territory had proposed a constitutional convention at its provisional capital, Lecompton; but instead of voting on a full plan of operations with the constitution, Kansas leaders limited the vote almost to slavery question alone. Also, hoards of men from Missouri, Kentucky, and the southern states swarmed into Lecompton overnight, and Kansas voted to allow slavery.

A victory for slavery? A triumph for popular sovereignty? Douglas promptly denounced the vote as a fraud, saying that the people of Kansas had not voted on a constitution and must have another chance to express their views. His position alienated many southern supporters, and President Buchanan sent a postal service official to 50 Illinois towns to discharge any post master or employee who had openly supported Douglas.

Before the debates, in their senatorial campaign, Douglas had arranged speeches at Chicago and Springfield. His popularity brought great crowds to hear him. Lincoln sat in the back of the crowds both times, waited for Douglas to finish, and then, as the crowd started to leave, Lincoln announced from the platform that in an hour, "so you can eat dinner," he would answer Judge Douglas' speech. The crowd roared, "We'll be here."

Douglas publicly denounced this tactic. Then Lincoln proposed that the candidates meet jointly, one against the other, several times in the future. Douglas' advisers urged him to refuse. Why should he provide the big crowds of voters to hear Lincoln? However, it appeared that it would be politically advisable to go ahead and agree to the debates. Douglas proposed meetings at seven small towns scattered over the state; Ottawa, Freeport, Jonesboro, Charleston, Galesburg, Quincy, and Alton. Lincoln accepted, and the time limits were fixed.

Because the candidates, if only in a single state election, were excellent speakers on subjects of great national importance, the eastern press, as well as the Illinois newspapers, was there to take down the exact words of the speakers. Telegraph lines worked all night and nearly all of America read the next morning what the candidates had said and read greatly contradictory reports on who won the last debate.

For example, as to one debate, Republican newspapers said, "Honest Abe chewed up the Little Giant and spit him out to the delight of the crowd." Of the same debate, Democratic newspapers said, "Douglas knocked out Lincoln's spindly shanks from under him and as he struggled for composure, the crowd roared at the spectacle."

At another debate, a Republican newspaper said that after the debate, a torchlight procession with 800 oil torches escorted Lincoln from the debating area to his hotel; while Douglas' procession had eight torch lights and

three of them ran out of oil.

What did Lincoln and Douglas of Illinois discuss that so captured the attention of the nation? They talked of a national bank. They argued over the location of a new railroad to the Pacific to go in the North or through the South. They delved into individual rights of states under the Constitution. The primary topic, however, which governed the thinking of the other issues was the question of slavery. In several debates, Lincoln often quoted the Declaration of Independence, which said that all men were created equal. Lincoln reminded the crowds that the Declaration said "all men," not just white men. Douglas answered, "Are you willing to say that every man of our Founding Fathers who signed that great document declared that every Negro was his equal, but was hypocritical enough to go back to his home and hold his slaves?"

At the Illinois Republic Convention in Springfield on June 16, 1858, Lincoln had been nominated for the Senate race. At that time, he made his famous "House Divided" speech. In his acceptance speech for the Senate race, Lincoln quoted from Scripture, "A house divided against itself cannot stand. I believe this government cannot endure permanently half slave and half free. I do not expect the Union to dissolve. I do not expect the house to fall, but I do expect that it will cease to be divided. It will be come all one thing or the other." This Lincoln speech before the debates gave Douglas grounds for substantial attacks.

At Ottawa, Douglas used Lincoln's "House Divided" speech to bring scorn on his adversary. Douglas told the crowd, "Lincoln says the Union cannot exist divided into free and slave states. If it cannot endure thus divided, then he must strive to make them all free or all slave, or be for dissolution of the Union. Does he not know we are divided in many ways in culture, speech, and business? If we must all think, speak, and conduct our lives exactly as our neighbors, the Union must perish."

At Charleston, Douglas said, "When this government was established by Washington, Jefferson, Madison, Franklin, and the other patriots of the day, it was composed of free states and slave states, bound together by our common Constitution." In the actual debates which totaled 21 hours of speaking, certain statements stand out as to what the speaker wanted to emphasize, even repeating at different towns. If one statement by Lincoln evoked loud applause and shouts of "That's our rail splitter!" and "Hurray for Honest Abe!" the speaker was astute enough to use it for another audience. Douglas used the same strategy with good results.

There seemed to be three basic rules:

1. To explain your stand on subjects of interest;

2. To persuade your listeners to adopt your position;

3. To ridicule your opponent's stand as being illogical, unattainable, and completely unacceptable to the listeners.

Lincoln commented that the Declaration of Independence and the Constitution said all men are created equal, not necessarily equal in their ability or born in equal circumstance, but equal in freedom to work and eat the bread they earned by their labor.

It was at Charleston that Lincoln made the comments that came back to haunt him in future years. Apparently Mr. Lincoln observed that even in free Illinois where the speeches were being made, the people were not yet ready for full equality of races. He said, "I want to make it plain that I am not in favor of making voters or jurors of Negros, nor qualifying them to hold office, nor to intermarry with white people. (If this reference to Negros not voting seems unreal by today's standards, we might remember that until 1920, women could not vote in the United States. It took an Amendment to the Constitution to give them that right.)

In the debates, Lincoln kept emphasizing the moral wrong of slavery. As in Alton, he said, "While we have no power through the federal government to erase slavery where it now exists, we must keep this great wrong from spreading. When Judge Douglas is inviting states to establish slavery, he is blowing out the moral lights around us." Lincoln said at the next debate that he had a line he would not cross. He said, "I say upon this occasion I do not perceive that because the white man is to have the superior position in our land, the Negro should be denied everything."

In all of the debates, the crowds loved to shout when a statement pleased them and to boo and hiss when a speaker brought up some statement of the opposition, which he knew the crowd would dislike. Both Lincoln and Douglas on several occasions said that they needed all of their allotted time to cover the subjects and they asked the crowd not to express its dislike or approval until the end of the speech. The crowds paid no attention to this.

At a subsequent debate, the "House Divided" speech came up again and Douglas said, "Why cannot we act as our fathers did? In Washington's army, there was no sectional strife. These brave soldiers fought under a common policy; they sought a common destiny, and no one was ready to forego a common aim because he did not agree with his fellows on every idea."

With regard to the question of what the Constitution covered on slavery, it is interesting to note that after the Civil War had started and Lincoln set out his Emancipation Proclamation, he believed he had no right to free the slaves except as a special power during a war. His proclamation freed only slaves in the Confederate States, those taking up arms against the United States. Some citizens of Pennsylvania, Maryland, Delaware, and New Jersey owned slaves, but they were not freed by Lincoln's proclamation.

A story on the 1858 Debates should not end with the last meeting in Alton. Natural questions would be: Who won the debates and what happened to Lincoln and Douglas afterward?

You might say that Douglas won the debates, because after the campaign, the Illinois Legislature voted 54 to 46 in favor of Douglas, and he returned to his senatorial seat.

In 1860, Lincoln—a national figure from the debates—was nominated for president by the Republican Party. Douglas was nominated by the Democrats, but only by a splintered party. At the Democratic Convention in Charleston, South Carolina, disagreements between northern and southern Democrats became so heated that several states withdrew their delegations and their people walked out of the convention. It was adjourned to pick up in Baltimore. Douglas became the favorite nominee, but John Bell was nominated by a "constitutional" group and John C. Breckinridge was nominated by the secession advocates. As a result, when the national election took place in November 1860, the Democratic vote was split three ways and the Republican Lincoln was elected.

After the election and the firing on Fort Sumpter by Confederate forces, Douglas asked President Lincoln what he could do to help preserve the Union. Lincoln stated that a number of border

CONTINUED ON PAGE 30

"Perhaps We Have Not Done So Badly After All."

Reflecting on Lincoln's Legacy for the Profession of Law

By Justice Patricia Timmons-Goodson

"In 1876, the celebrated orator, Frederick Douglas, dedicated a monument in Washington, DC, erected by black Americans to honor Abraham Lincoln. The former slave told his audience that 'there is little necessity on this occasion to speak at length and critically of this great and good man, and of his high mission in the world. That ground has been fully occupied. . . . The whole field of fact and fancy has been gleaned and garnered. Any man can say things that are true of Abraham Lincoln, but no man can say anything that is new of Abraham Lincoln.'"[1]

Kazu Nitta/Images.com

Some 133 years later, celebrating Lincoln's bicentennial birthday, I acquired a renewed appreciation for the words of Frederick Douglas on that day in 1876. My task—originally in a speech to the Mecklenburg County Bar, and later in this piece for the *Journal*—was to deliver an appropriate Law Day message consistent with the 2009 theme, *A Legacy of Liberty—Celebrating Lincoln's Bicentennial.* Contemplating the issue, I struggled to develop a message, to offer some thoughts or insights on our 16th president that would offer a fresh perspective.

In the process, I read and learned much about Lincoln the historical figure. I reflected on Lincoln, the man. Indeed, I quickly came to believe that if one simply did some reading about Lincoln, reviewed his writings and his

speeches, or read of his discussions and debates, one would swiftly discern his occupation—lawyer. Lincoln was, in fact, a veteran trial lawyer who handled contested wills, railroad tax entanglements, and even murder cases. Indeed, his experiences were not limited to law. He remains the only president to hold a patent—a device designed to lift river boats over shoal.

Ronald C. White argues that this breadth of experience taught him to appreciate opposing points of view.[2] He assiduously cultivated the skill of marshaling facts and arguments to sway people over to his point of view. He is reported to have had great interpersonal skills. John Nicolay, one of Lincoln's secretaries, noted his boss' uncanny ability to evaluate the measure of people: "He knew men on the instant."[3]

With the benefit of my reading and newly acquired knowledge, I prayed for some inspiration. The inspiration came, improbably enough, in that most unsentimental of places, the grocery checkout line. Since I am still old-fashioned enough to prefer cash to debit or credit cards, I found myself staring at the image of our 16th President on a five-dollar note. His appearance on that currency puts him alongside some of the true giants in the American pantheon, folks like George Washington, Thomas Jefferson, Andrew Hamilton, and Benjamin Franklin.

I can hear many of my readers thinking, "So what? Of course, Abraham Lincoln is every bit as iconic, as much a piece of Americana, as baseball and apple pie." I mention this because today we take for granted that he was a "great" man. Not just the United States, but nations around the world from Paraguay to Liberia to Abu Dhabi have put his face on their currency. At his death, Secretary of War Edwin M. Stanton stood by the great man and is supposed to have declared, "Now he belongs to the ages."[4]

Easily forgotten is the historical reality that Lincoln, the man, did not always inspire the confidence, or the intensity, that Lincoln, the idol, does today. Indeed, some of the highest praise that could be mustered for him at the time of his nomination was the consensus that, "Perhaps we have not done so badly after all."[5]

That fascinating story is a chasm away from our world of 24-hour news channels and blogs. Apparently, after he secured the 1860 Republican nomination for president, in Chicago, a group of party leaders rode the train to Springfield, Illinois, to give Abraham Lincoln the formal notification. Most of these party leaders had never met, or indeed seen Abraham Lincoln. In fact, most had supported one of the other candidates. Many were disappointed by the eventual choice of Lincoln as the Republican nominee. There was considerable skepticism about the man and his abilities. About his physical appearance, it was said, "His pantaloons were very short, causing him to look very awkward."[6]

His contemporaries described him as "more or less careless of his personal attire."[7] And those were the views of his friends! Unflattering remarks were made about his Hoosier accent, and his vocabulary was declared "unrefined." Future Secretary of War, Edwin Stanton, the same man who was to declare that Lincoln "belonged to the ages," sang a very different tune early in Lincoln's candidacy. At their first meeting, Stanton savaged the man who had brought Lincoln, declaring, "Why did you bring that long-armed ape here; he does not know anything and can do you no good."[8]

It was against this background, in a small parlor in Springfield, that these dignitaries—mostly from the great eastern cities—presented

this practically unknown mid-westerner, Abraham Lincoln, with the letter formally notifying him of his nomination. "The Chairman, George Ashmun of Massachusetts, made a brief, formal speech. The lanky stranger then lifted his head and made a short, dignified reply, thanking them, hinting at an awareness of the size of his responsibility, promising to write a formal acceptance, and expressing a wish to shake each of them by the hand. After they left the house, the surprised governor of an eastern state remarked: 'Why sir, they told me he was a rough diamond; nothing could have been in better taste than that speech.' And the dignitaries, conferring, said to each other: 'Perhaps we have not done so badly after all.'"[9]

This story gives us an excellent template for measuring our own professional lives as we celebrate Law Day 2009. So many of us are called to the bar for so many reasons, and yet all of us tend to be high achievers. Having worked hard through preparatory or high school, college, law school, and, finally, in actual practice, we not only concede to our type-A personalities, we positively revel in them. We take pride in them. They become part of our identity and self-image.

Why is our drive for success an issue? I believe it is an issue because this process inevitably sets up higher and higher hurdles for us until even the best must falter. So many of us demand that we be kings of all creation, the best of the best, the crème de la crème, that we inevitably set ourselves up to fail.

Perhaps this explains the results of a 2000 American Bar Association survey which found that only 27% of the lawyers polled were *very satisfied* with their professional life. The remaining 73% described themselves as *somewhat satisfied*, at best, or very dissatisfied, at worst.[10] Lawyers have the highest rate of depression across a survey of 105 occupations in the United States.[11] According to an American Bar Association poll, 84% of lawyers said their expectations about helping to improve society were not met.[12]

After all, the best of us cannot win every case, persuade every client, recover every cent, and rectify every wrong. However; as long as we have accomplished something toward our objective, as long as we walk away with at least half a loaf for a client who previously had none, as long as we conducted a trial free of prejudicial error, we can turn and say, "Perhaps we have not done so badly after all."

Yes, a few of us are destined to achieve the highest aspirations that drove many of us to law school: freeing an innocent man from death row; winning a mass tort case like Julia Roberts in *Erin Brockovich*; dismantling a major crime organization; presiding over the trial of the century; writing the seminal case in an important area of the law. The recognition of the reality of our everyday professional existence should not deter the rest of us from what we will accomplish. These are the small, continuous victories we win every day, yet we don't even recognize them as such. Maybe we could not get an acquittal for the client, but we got the client a lesser sentence. Maybe we could not get the client custody of the children, but we got the client greater visitation rights. Maybe the debtor would not pay their full debt to our client, but the client got more as a result of our efforts than they would have otherwise. Perhaps we did not get that judicial appointment, but our practice contributes significantly to justice for all. By any of those measures, we should be able to say, "Perhaps we have not done so badly after all." In fact, it is important to acknowledge this, because the client likely will not. A client who is facing a prison sentence, loss of custody, or commercial disappointment is likely to be hurting, and we are going to be the face of that pain.

Even successful litigation or successful efforts may not gather much by way of gratitude. The Gospel according to Luke records that Jesus cured ten lepers, and only one them bothered to even thank him.[13] Why would we expect a better outcome than Jesus? However, it is entirely appropriate for us to acknowledge that, "Perhaps we have not done so badly after all."

Perhaps it is not to our lot to argue cases settling presidential elections before the Supreme Court. Yet the outcome of our clients' own cases will weigh in their minds far more strongly than a dozen Supreme Court cases. It is important for us to be cognizant of that fact, to be thankful for our small victories, and to remind ourselves again that, "Perhaps we have not done so badly after all." This is even more important because, as we are reminded daily, we wear two hats: we serve our clients, and we serve as officers of the court.

I have discussed what our work means to our clients. Now, let me briefly discuss that second hat. As Abraham Lincoln realized that the future of mankind and our country would be affected by his policies and decisions, so must we, members of the bar, understand that the future of our profession will be affected by our actions and our ethics. The very existence of our profession is a tremendous tribute to the nation and world we have built. The existence of the court system is an acknowledgment that we live in a time and place where we have agreed to settle our differences with rules and laws rather than bombs and bullets.

The importance of this cannot be overstated. At the height of the blitz over Britain in 1940, Winston Churchill is supposed to have asked his staff at the start of his daily briefing: "Are the courts functioning?"[14] The famously unsentimental Churchill's focus on the courts with his capital in flames all around him is a testament to the functional importance of law in a modern society. And a reason for its practitioners to say, "Perhaps we have not done so badly after all."

In closing, as we celebrate Law Day 2009, let us celebrate the strength and vibrancy of our laws and the rule of law. We must always understand that the rule of law is only as secure, and as strong, as the persons that support it. Lawyers make up the most vocal and critical group of supporters. We, as lawyers, must stay strong and be vigilant in that support of the rule of law. And in doing so, we remind ourselves "Perhaps we have not done so badly after all." ■

Justice Patricia Timmons-Goodson is a member of the North Carolina Supreme Court and is in her 24th year of service in the judiciary. She serves as co-chair of the editorial board of the ABA's Judges' Journal *and is a member of the* Perspectives Magazine *editorial board.*

Endnotes

1 Doris Kearns Goodwin, *Team of Rivals*, intro. at xv.

2 Ronald C. White Jr., *A. Lincoln* (Random House 2009).

3 William Lee Miller, *Lincoln's Virtues: An Ethical Biography*, 10 (2002).

4 William L. Stidger, *The Lincoln Book of Poems*, 31 (1911).

5 Miller, *supra* note 3, at 10.

6 *Id.*

7 *Id.*

8 David Herbert Donald, *Lincoln*, 186 (1995).

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11 Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 874 (1999).

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13 Luke 17:11-19.

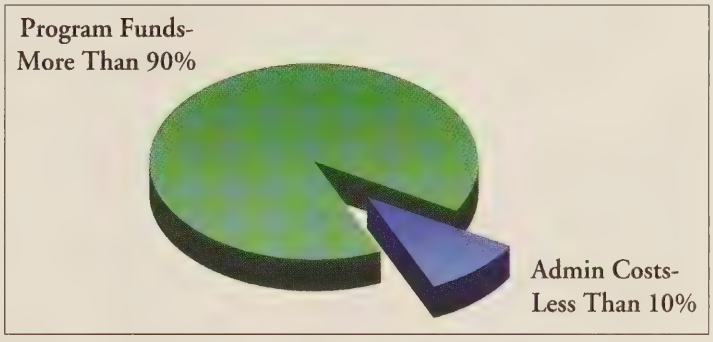
14 M. P. Bhandara, *The Three-Year Itch*, Dawn (Pak) at 22 (Sept. 15, 2002).

IOLTA Grants Support Equal Access to Justice

By Clifton Barnes

In celebration of the 25th anniversary of NC IOLTA, the NC State Bar Journal *is publishing a three-part series on NC IOLTA during 2009. This final article highlights some of the program's grantmaking.*

It reads like a movie script or maybe a modern-day *Lassie* TV show. Teenage boys, whose father is in jail and whose mother is homeless, reunite from different foster homes. The older teen gets an apartment in public housing, finds a job, and wins custody of the younger teen, who is still in high school.



Though IOLTA administration costs are also paid from program income, almost all the interest coming from the IOLTA accounts goes to making grants. IOLTA expenses have consistently been under ten percent of income since its inception.

Because they can't pay a pet deposit, they have to part with their beloved Jack Russell terrier. But the dog keeps finding its way back to the teens' apartment and the housing authority, saying the two disregarded public housing rules, sues for eviction.

Ultimately, a pro bono legal services attorney is able to negotiate a settlement so the brothers can stay in their home.

From unusual cases such as that one to the all-too-usual cases which involve protecting young mothers from abusive spouses and saving older couples' homes, grants from the North Carolina Interest on Lawyers Trust Accounts have been there to help.

Since its first grants were awarded in 1984, the NC IOLTA program has provided more than $50 million for legal assistance for at-risk children, the elderly, the disabled, and the poor in need of basic necessities. In addition, the program has helped lawyers connect with those who need their pro bono assistance.

"IOLTA funding is extremely important to Pisgah Legal Services," said Jim Barrett, PLS Executive Director. "PLS receives IOLTA funding to serve six counties in western North Carolina. Stable IOLTA funding has helped PLS grow to the point that it has 37 staff members, including 17 attorneys."

In 2008, through Pisgah Legal Services alone, those attorneys helped more than 700 victims of domestic violence obtain or enforce court protective orders and helped prevent homelessness for 593 households under threat of foreclosure or eviction.

"The flexible IOLTA funds play a crucial role in PLS' budget," Barrett said.

IOLTA funding is the only source of money specifically to pay for PLS' administration of the successful Mountain Area Volunteer Lawyer Program, which last year provided pro bono legal services in 827 closed cases, valued conservatively at nearly half a million dollars.

"Unlike the support of private foundations, which is often project-oriented, IOLTA funds are generally used for operating support," said Evelyn Pursley, executive director of NC IOLTA.

In 2008, NC IOLTA administered just over $4 million in grants, compared to $200,000 25 years ago. (In addition, NC IOLTA now administers more than $6 million in state funds annually for legal aid that passes through the NC State Bar.)

"The largest annual grant goes out to Legal Aid of North Carolina, the statewide program that also receives federal and state funds to do this work," Pursley said.

"Over the past 17 years, it has been my honor and privilege to work with the highly dedicated and selfless attorneys, paralegals and staff at the various legal aid organizations throughout the state, including Legal Services of NC, Legal Aid of NC, Legal Services of Southern Piedmont, Pisgah Legal Services, and the Legal Aid Society of Northwest North Carolina. These dedicated individuals provide much needed legal assistance for the poorest of the poor. I am always amazed at the dedication of the legal aid attorneys…Sometimes I wonder why they do it, and then I see the people that they help and remember the overwhelming satisfaction I have received in helping those less fortunate resolve their legal problems.

Over the years, I have been involved in a wide variety of pro bono projects and have been very impressed with the outpouring of support for these various projects among lawyers both in our firm and throughout the state. It is a tribute to our profession that people are willing to give so much of their time —including large blocks of time away from their families— to help a low-income person from New Orleans to New York and back to North Carolina."

Reid Calwell "Cal" Adams, Vice-Chair, NC Equal Access to Justice Commission
2007 Recipient Thorp Pro Bono Award
Womble Carlyle Sandridge & Rice, PLLC

Legal Aid of North Carolina, which provides free legal representation in civil matters to eligible clients in all 100 counties through 24 offices and six statewide projects, receives 52% of its funding through the federal Legal Services Corp.

"Some of that federal money is restricted, so we have to use other funding," said George Hausen, executive director of Legal Aid of NC. "We would be severely and negatively impacted if we did not get those IOLTA funds."

IOLTA funds 11% of Legal Aid's budget. "Not only is that substantial, but the support that IOLTA generates for Legal Aid through the bar association and the bar in general is tremendous," he said. "IOLTA is the nexus for the whole statewide justice community."

Hausen said the influence of the NC IOLTA Board of Trustees is significant.

"When we write our IOLTA grant application each year, it's like a validation of our program," he said. "Does IOLTA agree with the allocation of our resources and approve of the quality of the services we deliver? It really is a check on the direction and quality of specific projects."

For instance, a call center with a toll-free number with attorneys providing advice, brief service, and referrals has largely been funded by IOLTA. "It's been a successful one-stop shop for clients to be able to talk to a lawyer immediately," Hausen said.

In addition, IOLTA funded the technology for a web-based case management system that "makes us a statewide law firm," he said.

"They have funded a great technology package that allowed us to expand our services," Hausen said. IOLTA grants fund video conferencing clinics where one person can do what it took 25 throughout the state to do previously. In addition, Legal Aid has been able to help clients with foreclosures, many in rural areas, as the result of IOLTA grants.

Since 1992, IOLTA has funded the Clifton W. Everett Sr. Fellowship, which provides attorneys to these underserved rural areas of the state. Everett played a large role in creating the NC IOLTA program when he served as president of the NC State Bar. He later served as an IOLTA trustee from 1983 to 1990. IOLTA now funds two fellows every year.

The fellowships support entry-level staff attorney positions at Legal Aid so that they can recruit interested recent law school graduates and give them an opportunity to learn about the legal services practice and develop practical lawyering skills under experienced mentors. In addition, the fellowships provide staff assistance to rural programs that have difficulty recruiting and retaining attorneys.

The first proactive grant-making done by IOLTA also came in 1992, when it offered grants to volunteer lawyer programs to ensure that VLPs were established statewide. IOLTA continues to provide about $500,000 each year for volunteer lawyer programs that put private practice attorneys together with clients who need pro bono services.

Besides providing civil legal services to indigents, which historically accounts for 87% of grants awarded, the NC IOLTA program is limited to making grants for the improvement of attorney grievance and disciplinary procedures, for student loans for legal education on the basis of need, and for programs designed to improve the administration of justice.

One administration of justice grant program is the IOLTA Public Service Internship Program, which has been in existence since 1988. Stipends are provided for North Carolina accredited law school students to work summers in public interest organizations approved by the NC IOLTA Board. (See the Spring and Summer 2009 issues of the *Journal* for descriptions of summer internships by law students.)

"I think the trustees particularly like these grants because they feel as if there is a double or triple benefit," Pursley said. "They benefit the law schools by giving their students good summer placements. They benefit the students by ensuring some payment for the summer internship. And, they benefit the public interest organization by providing summer interns who they could not afford to pay."

Carol Spruill, who started the Pro Bono Project at Duke University in 1991 and served

as Duke's Associate Dean for Public Interest and Pro Bono until her resignation in December 2008, is an unabashed fan of IOLTA. This intern program is one reason why.

She says the stipends enable students to experience legal work in the public interest and, as a result, they often have transformative experiences.

"Many students have completed these summers determined to continue with their desire to serve those clients who face many hard knocks in life," said Spruill, who was a legal aid attorney from 1975 to 1991. "Even if the law students do not continue public service as a full-time career, all of them come out of the experience with a heightened appreciation of the need for more public service attorneys, and all of them are prepared to make pro bono commitments a significant part of their legal careers."

Spruill said that students fear accepting lower-paying public interest jobs after law school due to tuition debts that can grow to $100,000 or more. IOLTA has helped address that problem as well.

NC LEAF (Legal Education Assistance Foundation) is the country's first nonprofit organization dedicated to providing loan repayment assistance to attorneys in exchange for public service work.

"Simply put, NC LEAF could not function without support from IOLTA," said Esther Hall, NC LEAF Executive Director.

Over the years, the NC LEAF has received $667,000 in grants from IOLTA which have been used for operational support. "That allows all of our state funding to be disbursed directly to public interest attorneys to assist with the law school debts," Hall said.

Well more than $3 million in educational loan repayment assistance has been provided to these public interest attorneys. "IOLTA has been a steadfast supporter of the work of NC LEAF and has been a vital part of our program, enabling us to aid 404 attorneys since our inception in 1989," Hall said.

These attorneys have served as assistant district attorneys, public defenders, legal aid, and legal services attorneys. "Their work ensures the equal access to justice our society prizes," Hall said.

Former NC State Bar President Steve Michael of Kitty Hawk agrees. "IOLTA grants certainly help us fulfill our responsibilities outlined in the Rules of Professional Conduct," said Michael, who successfully worked for mandatory IOLTA in North Carolina. "Providing access to justice is one of the big obligations we assume, and this is one method of fulfilling those obligations."

Michael said that the IOLTA Board has done a good job over the years in selecting programs that have the biggest impact in providing access to justice. He said it is appropriate that the bulk of the grant money goes to legal services for the poor.

"But there are also grants IOLTA has made to start up programs that further the administration of justice," he said. "Once the programs are up and running, the funds will come to keep them going."

For instance, Michael noted IOLTA grants were instrumental in getting the Equal Access to Justice programs going, and now those programs will receive funding from the State Bar.

"The NC Equal Access to Justice Commission and the Equal Justice Alliance would not exist without the leadership of and funding provided by IOLTA," said Jennifer Lechner, executive director of the Commission and Alliance.

Pursley, the NC IOLTA Executive Director, and Michelle Cofield, director of public service and pro bono activities for the North Carolina Bar Association, presented information about the national trend of state access to justice commissions to then-NC Supreme Court Chief Justice I. Beverly Lake, who, as a result, established the Equal Access to Justice Commission.

IOLTA funded staffing and activities of the commission. Cofield served as the first executive director until 2008, when Lechner was hired as a full-time staff person for the commission and the alliance. That position was only made possible through IOLTA funding.

"Our (IOLTA) program has been and is still an active participant in determining how the problem of providing access to justice in our state should be addressed," said Tom Lunsford, executive director of the NC State Bar. "The IOLTA Board and staff are appropriately and usefully involved in shaping policy and in rationalizing the delivery of legal services. Our philanthropy is active and responsible, not passive and disengaged."

For instance, Pursley, recognizing a need for more collaboration, and was instrumental in creating the Equal Justice Alliance as a forum for civil legal aid providers who receive IOLTA funding to discuss coordination of legal services and efforts to increase resources. That group now meets regularly.

One member of that group who is thankful for IOLTA is Vicki Smith, executive director of Disability Rights North Carolina. In 2007, Carolina Legal Assistance became the federally mandated "Protection and Advocacy Agency" for North Carolina and changed its name to Disability Rights North Carolina. But, had it not been for IOLTA, the program would have died years ago.

"Beginning in 1998, our program was without any stable source of funding and, as a result, the program lost most of its staff," Smith said. "IOLTA funding, however, made it possible for our program to continue. IOLTA funding allowed us to pursue new grant proposals to secure a substitute funding source, continue our legal work, sustain an operating budget, and allow the board to devote the time and energy necessary for designation as the new Protection and Advocacy agency for North Carolina."

The purpose of a Protection and Advocacy agency is to protect and be an advocate for the human and legal rights of those with mental illness or developmental and other disabilities.

As Jim Barrett of Pisgah Legal Services said, "People would be amazed if they knew how much good IOLTA funds do."

Still, Hausen says that Legal Aid, for various reasons, is only able to provide service to about 30% of the people who contact them. More than two million North Carolinians currently qualify for legal services help—that's 28% of the state's population.

The programs have to set priorities so they can take the cases that will make the most difference in people's lives. Though funding sources sometimes affect priorities, the legal aid programs generally focus on helping clients with the basic necessities of life—food, shelter, safety, health, employment, and education. Says Pursley, "I think this economic downturn in particular has made us all more aware of how important these basic needs are to all of us and how vulnerable we can be to their loss."

Hausen said he'd love to see expanded IOLTA funding through "comparability,"

which is in at least 25 other states and requires that lawyers hold their IOLTA accounts only at banks that agree to pay those accounts the highest rate available to that bank's other similar accounts.

Some states that have gone to "comparability" requirements have seen income double or triple within the first year or two.

NC State Bar President John McMillan has made exploring a comparability requirement for NC IOLTA a goal of his presidency.

Spruill said that she hopes leaders will adopt comparability so that more low-income North Carolinians will have their day in court with an attorney by their side.

"Perhaps we will see fewer batterers get away with abuse of their spouses, fewer families thrown out on the street without a fair hearing, and more people getting all the benefits and medical care that our laws say should be provided to them," she said.

Bill Womble Sr., an original member of the IOLTA Board of Trustees, has been an active and well-respected member of the bar in North Carolina since 1939.

"I don't know that we will ever have adequate financing to provide the kind of legal services we'd like to provide to the poor of our state," Womble said. "But the goal of equal justice for all is a good and noble one, for which we should constantly strive. IOLTA has an important role to play in that effort."

Woody Teague, a founding IOLTA Board member echoes Bill Womble. "Back in 1978-79, Cliff Everett, Robinson Everett, and I had a hard time explaining the concept of IOLTA to the satisfaction of the late Chief Justice Joe Branch. But now Joe, Cliff, and Robbie would agree with me that this program, established by the North Carolina State Bar, has negated the usual lawyer jokes. Over $50 million for equal justice is something all of us lawyers should be extremely proud of. So, I say, 'Long live IOLTA.'" ■

Barnes, who majored in journalism and political science at UNC-Chapel Hill, served as director of communications of the NC Bar Association from 1987-2002. He now runs his own writing, editing, and web development business named cb3media.com.

Three Public Interest Lawyers Pay Off Law School Debt in 2008 with Assistance from NC LEAF

NC IOLTA supports NC LEAF, the first loan repayment assistance program for public interest lawyers in the country. By using NC IOLTA funds to support operations, NC LEAF is able to use all state funds received to help young lawyers in legal aid, public defender, and district attorney offices with loan repayment assistance.

Ann Bamburger

I attended law school at American University with the idea that I would become an advocate for those who don't have a voice in our society. I have always had an interest in women and children's issues. I knew that my goal after graduation was to work in a legal services office.

When I first began working at Pisgah Legal Services, I almost turned down the job of representing clients fleeing domestic violence because I was concerned about whether I could afford to work as a legal services attorney. When I learned about NC LEAF, I decided to take the job. I was thrilled to be part of Pisgah's Mountain Violence Prevention Project. I had the opportunity to represent clients fleeing domestic violence and assist them in obtaining the legal remedies necessary to break away from the situation.

Denise Lockett

NC LEAF's assistance has meant the world to my family. Without it, my debt from graduate and law school would have made it much, much harder to move to and stay with my dream job at Legal Aid of North Carolina.

I went to law school with the goal of working in the nonprofit sector. It actually took a while to get there—primarily because I was initially so concerned about paying back my loans. I was able to move from a private firm position to Legal Aid with far greater confidence because of NC LEAF's assistance. I took a substantial pay cut to move to this position. Without NC LEAF's assistance, I'm not sure I could have made the move nor stayed here. We are now debt-free from my law school loan, and that's terrific. I'm doing the work that I love and that our community needs, thanks to NC LEAF!

Pamela Thombs

With a 12-year history of working in the nonprofit sector, I knew when I graduated from law school that I wanted to serve in public interest law. I had been working in public interest law for at least three years when I obtained information on the NC LEAF program. At that time, my family had two small children in day care, a house with a mortgage that we were not able to sell in a city where we had lived previously, and a lease payment at our current home. All of this was in addition to our other regular living expenses and my student loan payment. I needed NC LEAF if I was to continue down this public interest road.

After NC LEAF approved me for the program and I had made payments for about a year, NC LEAF staff member Arlene Summers helped me restructure my law school debt to get the maximum benefit from the program. I began to pay a little more, and NC LEAF assisted me with a larger amount. About three months before I was finished with my payments, Legal Aid of North Carolina, my employer, began assisting employees through the NC LEAF program. These factors combined allowed me to pay my off my debt much earlier. I am extremely grateful to NC LEAF for allowing those of us who are committed to giving back to the community to do so without becoming indigent. ■

Taking the Pain Out of Foreign Language Documents

By Lillian Clementi

The attorney was frantic. With trial only days away, she had just remembered that she had to stipulate to the other side's translations of key French documents—and the material filled several boxes. "I [messed] up," she said ruefully. "I simply forgot about the French."

With non-English material increasingly prominent in US legal proceedings, this kind of scenario has become more and more common—and not because of incompetence or negligence. For many attorneys, working with documents they cannot read is a headache, and managing foreign-language documents can be a challenge even for a well-organized law firm. The good news is that if you follow four common-sense guidelines—1) planning ahead; 2) using a professional; 3) setting up a realistic budget; and 4) listening to your translator—you can handle non-English material more effectively, avoid disaster, and get the most for your translation dollar.

Plan Ahead

The temptation to set non-English material aside for later is perfectly natural, but—as in the real-life example above—yielding to it can be dangerous.

Solution: inventory foreign-language documents right away, especially if you don't know what you have. Even if you and your team are too busy to deal with them early in the case—and almost everyone is—the right linguist can help. With a few background documents and a quick briefing, an experienced translator can get to work right away, reviewing and analyzing your foreign material while you focus on other priorities.

Planning is equally important for the back end of your case. If you are a litigator, think ahead to depositions. What documents will need to be translated in advance? Will you need to have an interpreter present? Be sure that your team's pre-trial checklist gives you plenty of time to stipulate to the other side's translations, prepare your own certified translations, and—if any of your witnesses are uncomfortable testifying in English—book a competent interpreter well in advance. A small up-front investment in planning will save significant time, money, and stress later.

A Little Learning is a Dangerous Thing

It's natural to turn to a bilingual colleague when non-English material surfaces. But "knowing some Spanish" doesn't necessarily qualify a paralegal or even an attorney to translate or review foreign-language documents, says Thomas L. West III, owner of Intermark Language Services and former president of the American Translators Association (ATA). "A lawyer I know got a fax from his Latin American subsidiary and gave it to his Spanish-speaking secretary," he recalls. "Three words stood out: celebración, asamblea, and social. 'Relax, they're just having a party,' she said. It turned out to be an invitation to a shareholders meeting."

Go with a Pro

Bottom line: translation errors can be costly—even disastrous—so it pays to work with a professional. But how do you find the right language services provider? The ATA offers free, searchable online databases of its member translators and translation agencies at www.atanet.org. With the Advanced Search function, you can tailor your search to the language pair and subject area you need, and even specify geographical distances for in-person review.

Getting the right people is important: some "bilingual" reviewers are a waste of money at any price. Marjon van den Bosch, a professional linguist with extensive experience in document review, recalls several litigation matters involving thousands of pages of Dutch. "A staffing agency was tasked with finding competent Dutch-speaking reviewers," she recalls. "But in each case it filled out the team with amateur bilinguals recruited from social networking sites and temp attorneys who had taken German in high school. Google Translate was their tool du jour." Solution: if your linguists will come from a staffing or translation agency, ask for specifics on its recruiting standards and the credentials of the people who will handle your documents.

Bang for the Buck

Quality translation does not come cheap, but you can save time and money by thinking through your needs. To draft a reasonable budget, ask a few key questions up front.

Does all of your foreign language material really need to be translated? A few hours of review time from the right translator or a pass through the right computer translation software can help you identify the documents that matter most. Irrelevant documents can be weeded out, and less important material can be gisted or summarized in a few lines or paragraphs—saving time, translation costs, and document-handling headaches over the life of your case.

If you are managing a large litigation, it is critical to determine how much non-English material you have, and in how many languages. Using a unicode-compliant review platform to work with electronic documents such as e-mail messages and Microsoft® Word documents is one solid answer, says e-discovery expert Conrad Jacoby, founder of efficientEDD. "One of the biggest challenges for a litigation team is simply knowing what they have," he notes. "Fortunately, unicode—a computing industry standard that allows computers to encode and display most of the world's writing systems—has made it dramatically easier to find unexpected foreign-language documents and treat them appropriately during processing or review."

Size Matters

Once you know what you have, you can develop a cost-effective strategy for review based on volume. "If I have 200 documents in a given language, I'll likely have a linguist do a document-by-document review," says Jacoby. "If I have 5,000, I'll have the linguist work with review software and use his or her language and subject matter expertise to help winnow the material. A competent reviewer can tell very quickly if something is completely irrelevant or needs further attention."

Scalpel or Bludgeon?

How accurate do your translations need to be? Fast and relatively inexpensive, computer translation is often useful for brute-force gisting and first-pass review, but you will almost certainly need specialized human review and translation for your most important documents. "At best, computer translation will only be about 80% accurate," says Joe Kanka, vice-president of corporate development for eTera Consulting, a litigation support firm based in Washington, DC, "so we want a professional translator at the table from day one. That, to us, is absolutely critical."

And 80% accuracy looks a lot less impressive when you realize that you don't know which 20% of your translation is inaccurate. For sensitive documents, a qualified human linguist is usually the best solution. "Once the material has been winnowed down," says Jacoby, "a qualified translator or native speaker with the right subject knowledge will almost certainly do a better job analyzing non-English material than a monoglot reviewer working from computer translations."

Listening for Added Value

A good translator should also be able to connect the dots, seeing each new document as part of a larger whole. Your documents tell a story, and if you are willing to listen, experienced linguists can help you piece it together.

Too few legal teams take advantage of this added value. To tap into it, simply provide translators and foreign-language reviewers with the background documents your attorneys and reviewers are using, and keep related English-language documents with foreign material when sending it out for translation. If you are working with more than one linguist, make sure that everyone on the team is sharing background and terminology. Stay focused on the big picture, and insist that your translators do the same.

Strong Relationships

Strong relationships and institutional memory generally help a law firm serve its clients more effectively, and the same is true for translation providers. In the case of the last-minute stipulations, the frantic attorney called a translator who had worked on the litigation for several years. She quickly proposed a damage-control strategy, and translators, paralegals, and attorney were able to work together to complete the review in time for trial.

Surprises are inevitable in legal work, but thinking critically about your timeline and budget and working closely with qualified linguists can make your project run more smoothly. Veteran patent translator and ATA President-Elect Nicholas Hartmann has seen this first-hand. "Ideally, the law firm, its client, and the translator work together, forming an effective partnership that enables all of us to keep our customers, earn their respect, and enhance our professional reputations." ■

A working linguist with more than 15 years of translation experience, Lillian Clementi provides translation, editing, and document review for Lingua Legal. An associate member of the American Bar Association, Lillian is also an active member of the American Translators Association (ATA) and has served as president for its Washington, DC, chapter and is the coordinator of ATA's School Outreach Program.

President's Message (cont.)

did a terrific job in appointing committee chairs this year, although some of the credit goes to Hank who originally appointed a few that I just asked to hold over. I am grateful to all of the committee chairs for their dedicated work this past year. To the members of the council who devote the better part of four weeks each year to State Bar business at quarterly meetings in addition to reading and digesting vast quantities of materials and attending committee and sub-committee meetings between those quarterly meetings, I thank you for allowing me to serve with you and for all the support you have given me over these past three years. Every one of you has responded positively and effectively when asked to perform tasks.

Finally, to those six past-presidents who served as members of the nominating committee and over three years ago asked me to serve as vice-president, I am grateful to you for your confidence and for giving me the opportunity to follow in your steps. I am proud to be a fellow lawyer in the North Carolina State Bar with all of you. ■

McMillan earned both his BA and JD degrees from the University of North Carolina at Chapel Hill. He was admitted to the practice of law in 1967. That same year he joined the firm with which he still practices—Manning, Fulton & Skinner, PA.

Donnie's Hawk

By Thomas Keith

My given name is Keith Corbett Pridgen Marshall, but you can call me Casey. The name is a combination of all the family names, white and black, of all my ancestors who took up patents to claim the lands between the Black and Cape Fear Rivers in what is now Pender County. The lands are covered by gum, swamps, bays, pines, and Cypress trees covered in Spanish moss. The Yankees foisted townships on us after 1868 and made a township out of the lands and called it Canetuck, but some outsiders call it Oblivion. I was born 86 years ago on what was once called the Fowl Foot Plantation according to the 1790 Anders patent. The rice fields are all tupelo gum and Cypress now, but I know where a few of the original drainage ditches remain. I know my time on this earth is short. I have led a good life. The Lord has allowed me to be born, work, raise my family, and hopefully die on the same lands my grandfather's grandfather, William Sr., and his sons wrestled from the bears, alligators, yellow flies, chiggers and cottonmouths to save from the tories, carpetbaggers, and tax collectors.

The incident of which I am to speak happened almost 46 years ago. For many years after the event, I puzzled over what happened, hoping to find an irrefutable explanation. Only in my old age am I now able to put aside the conventions of my education to find a satisfying answer. It was the answer I suspected all along.

The mystery began after I renewed my association with Donnie Corbett, a distant cousin of sorts. After the ninth grade, Donnie had only gone as far away from Still Bluff as the navy would send him, to Norfolk. After the second war, he began to work as a boiler maker for Babcock and Wilcox in Wilmington. He was a natural born mechanical genius. What broken machine parts he could not repair, he could fabricate from scratch using only homemade tools at his work bench in his home. A good union contract and 36 years on the job allowed him to retire well before he was 60. He determinedly kept active and became the community fix-it man. He also made a few dollars farming by selling his bottom land hay twice a year, just as I did. Small of stature and unusually thin, his skin had a dark bronze sheen from being outside. While not impecunious, he always wore the oldest, most faded, barbed wire-ripped denim jacket and what looked like might have been a leather ball cap to cover his bald spot. Never without a Camel cigarette, he could talk rapid fire like a Pridgen, with the butt stuck to his dry bottom lip flapping up and down like it was glued on. Donnie was a most unprepossessing man, but was also one of the smartest. He also had saved about every dollar he had ever made and invested wisely in the stock market. I settled his estate. I was amazed by the size and scope of his holdings. Maybe I should have been a union man.

About the time I began a little farming, Donnie started to take more interest in those activities, since he had no use for lawyers. Donnie was about ten years older than me. With my limited knowledge of farming and my total lack of mechanical ability, Donnie knew that his lawyer neighbor would need a lot of help. I was always tearing up my equipment; he was always repairing it. He used to tell me, "I could give you a piece of stainless steel and you would give it back rusted."

Even though our home places sat on large tracts, our houses and out buildings were both fairly close to each other on the same hill overlooking the bottom lands. In fact, the original Marshall tract shared a long boundary line with the Corbett tract. Our common deed descriptions had been copied and recopied in deed after deed without anyone ever updating the 1790 legal description. Both our deeds began at the same point. The legal descriptions started, "Beginning at a Cypress tree on the Cape Fear River." It was a good thing we both agreed on the location of the line.

Our houses were close enough that, while you could not see each other's buildings, you could hear a tractor start up on the other side of the hollow that barely separated the two tracts. When I lost or broke something on my tractor, I would turn off my engine while I tried to find or repair the part. That was down time. That's when I could hear Donnie start up "Fat Alice," his tractor, which he would ride to my rescue. Donnie would know that when my tractor engine noise stopped for too long, I had broken or lost something. He would swoop down from his hill and alight next to me to tell me what to do, help me find the lost part, and get me on my way. But that meant more down time since he'd talk for a long time after he had completed his task. He was retired; I wasn't. In the beginning, I resented Donnie's intrusions on my misfortunes. Eventually, I actually learned to look forward to his appearance and could summon his help without asking for it. All I had to do was turn off my tractor engine.

He would never charge me for his time, even if he worked half a day fixing something it took me five seconds to break. There was

The Results Are In!

This year the Publications Committee of the State Bar sponsored its Sixth Annual Fiction Writing Competition. Eight submissions were received and judged by a panel of eight committee members. The submissions that earned first prize is published in this edition of the *Journal*.

one thing he would charge me for, and that was his cutting and baling my hay since I sold it for cash. He cut my crop on shares using some ancient hay-making machinery that he had gotten third-hand, from which he somehow managed to coax another decade of usefulness. While he would let me borrow any of his newer farm equipment of the unbreakable kind, I never thought of asking to borrow his haybine and baler. Only Donnie could make the decrepit New Holland baler scoop up the long lines of wind rowed, new mown grass and pass it through the cranking, clanking, whirling machinery to transform it into a perfectly formed, rectangular, sweet-smelling, 60-pound bale of hay.

Not only did Donnie bale my hay and keep my implements running, he was constantly policing my fields for lost parts while riding on his Fiat-Allis tractor. He would even go by my tractor barn and survey my machinery to see what I had broken or lost each weekend that I allegedly farmed. He would make sure the lawyer was maintaining his equipment correctly. One time he even told me that he had seen some fuel dripping from my tractor and, without asking me, machined a new fuel line and replaced the one that had offended him. I never objected.

I had inherited the color blind gene from the Marshall family. Like my father, I am almost totally red-green color blind. I can tell you that primary red looks different than primary green, but I could not find a red ball on green grass. My wife has always had to dress me in the mornings, especially if I had court. On the mornings I would have to get up before her, she would lay out my properly color-coordinated clothes the night before. On the few occasions that I woke earlier than usual and had to dress without her supervision, someone in the office would smile at my choice of tie or shirt and remark, "Well Casey, it looks like you let your wife sleep in today." How did they know?

For recognition purposes, most farm equipment makers paint all their products a distinctive color; hence, John Deere green and Massey Ferguson red. Of course, there is a Ford blue, but Ford only makes tractors and not equipment anymore. My tractor was orange, indicating a homemade paint job on a piece of machinery of indistinguishable age and questionable paternity. Whenever you lose a red, green, or orange part in the field, it usually falls on green grass. This makes it invisible to me. Not only could Donnie see orange parts in green grass, but he had eyes like a hawk and the patience to go with the search.

On the occasions when he found one of my lost parts, he would either reinstall the part on the appropriate piece of machinery, or, if I wasn't around, he would place it on the tractor or implement close to where it should be installed by me. On the latter occasions, he would never tell me he had found the lost part. He would just let me discover it on my own the next time I got around to using the piece of equipment. I would then thank him. It was a ritual that we followed for years, continuing even after his untimely death.

Other than Donnie, I ran the place pretty much by myself with the exception of some occasional help from some of my daughters' college-aged male friends who made the mistake of trying to impress me by offering to help. One boy, Will, was willing to work hard for me. The only other regular companion to our work was the red tail hawk who patrolled the bottom land hay fields. Whenever the hawk heard my tractor in the hay field, he would appear *deus ex machina*. He would climb down from the sky and descend to the top of the tallest and biggest walnut tree at the most opposite end of the field where I was working. With each ten foot cutting swath of the bush hog, dozens of field mice would be revealed to the hawk and would be added to his menu. However, under no circumstances would the hawk ever come closer than the opposite end of whatever field I was working with the tractor. After all, the hawk came to eat, not talk.

One week before a Christmas holiday, Will called to tell me he was home from graduate school in botany at State College and needed to make some farm money for family gifts. I had put off repairing the line fence between Donnie and my farm hoping for such an offer from Will. I enjoyed fencing even more while sharing the task with someone like Will. One of his undergraduate majors in college was philosophy. Unlike the usual type of farm help, Will was able to talk about more than NASCAR and could discuss even more complicated subjects such as women. Our work that week would have us replace the old barbed wire along my common boundary line with Donnie and chain saw the ever encroaching, aggressive pine trees that kept sprouting up on the fence line. Even though I failed botany in Chapel Hill, I had learned this invasion by pine trees was called new field succession. Leave a field open and the pines will take over. That's all I recall about plants, since I flunked the course because in botany lab I could not see any color change to the green slide when I added the red dye to it. I told the professor my singular results, but he just thought as usual I had not done the experiment properly. I never told him I was color blind because I didn't confirm the fact for another 25 years until my oldest daughter enlisted me in her high school genetics experiment on inherited traits. One trait was colorblindness.

Between drilling in a few new fence posts and stringing ten rods of wire at a time, there was a continuous running banter between Will and I about the weightier subjects of the cosmos. Youth was more certain in its views. Every mystery could be accounted for by science. Life began when electricity hit two elements which combined into a single cell to form life. Will's professor had repeated this process in an experiment in chemistry lab. My only replies to Will were inquiries: "Well Will, I imagine that ants, who are an organized and intelligent society, have their science, too. Do they know of Avogadro's Number, the Golden Mean, or the Unified Field Theory? Maybe there are explanations beyond even our science we can never comprehend any more than ants. We all have our limits." Will thought man was smarter than ants and dissented.

This Christmas Eve Donnie heard our chain saw and, as usual, rode out to help. He did not like how we were stringing the wire and offered some better alternatives. He then sped off to get a rat-tailed file to sharpen my chain saw which he could tell was dull by the way it had scorched the recently sawn pine stumps. Donnie spent the rest of the afternoon clearing the fence line with my saw and supervising the fencing education of his two ignorant college-educated laborers. It was a bright, sunny day, about 50 degrees. It was perfect weather to work and not sweat. Of course, winter is also the only time to do fence work since the sumac leaves and poison ivy growing on the old wire are not a problem.

Donnie pointed out two five-inch thick trees he didn't want us to cut down, and rerouted the last leg of our fence line to avoid them. That puzzled me since some future heir might mistake the new route as the old boundary line. Donnie volunteered the reason, "I saved these two young walnut trees for

your girls, Casey. When they have children, you can cut them down and they'll pay for their college educations." Will had been prepared to cut the walnut trees down since they had snuck into the old fence line like the pines did. Will the botanist could tell you all about the genus *Juglans*, but had never met two real walnut trees in the woods until then. I wonder if Will the scientist ever learned that the Latin name for the tree meant "Jupiter's acorn," or a nut fit for a god.

We voted to take off Christmas day and to reassemble the day after to finish our work. Instead, I eased out of the house after presents on Christmas to continue the job myself with only an ax. I enjoyed the simple tool. I didn't have to pull my arm out of its socket to start it or add gas and oil. As long as I kept the ax sharp, it would reward me with a quiet thud and fragrant flying wood chips. The neighbors couldn't hear the ax, and I hardly ever broke one. Donnie never heard the ax that day or suspected I was working or he'd have joined in the fun. The women at home were too busy preparing the gargantuan Christmas feast to miss me either.

As I went to bed Christmas night, my wife asked me, "Doesn't that sound like a fire truck?" I could hear the wail of a siren going down the dirt road toward where the Corbetts lived and the hurtful howl of the neighborhood dogs in response. "No, that's an ambulance," I said assuredly from a few times riding in a rescue vehicle with my friend, "Beefeye," an EMS driver. My friend, like everyone in Canetuck, also had a real name, but since he had a big head and eyes wide apart like a cow, no one ever bothered to call him by his Christian name, Demetrius.

Arabella Corbett, Donnie's only daughter, had gone to the Canetuck school near the Lyon Swamp Canal with my daughters. Our families usually exchanged some small gifts of food at Christmastime. Sometimes I bought Donnie a tool for his previous year's management consultant work. This year I had done neither. "Bell," as Donnie's daughter was known, called me the next day to tell me that her dad, Donnie, had a heart attack and died Christmas night. The sirens were too late.

Will and I went back to work on the fence the day of the funeral and walked up the hill to the Corbett graveyard for Donnie's service. We hung back from the crowd since we were still in our work clothes. Donnie would have done the same; no reason to waste work time changing clothes. He would not have been offended, and anyway, if he were, as he often said, "The dead are too proud to speak." Bell had rounded up a new young preacher who, amazingly, did a superb job eulogizing someone who rarely saw the inside of a church and whom the preacher had never met. I told the preacher I wanted him to do my funeral at the appropriate time. The preacher thought my request was a comment on his theology. I meant it as a comment on his imagination. After the service, Will and I went back to our fence work. Youth, yet unaccustomed to death, had a hard time understanding how someone could be so vital one day and gone the next. Science now did not give him a satisfying answer to the subject of death. I only guessed it was the cigarettes that killed Donnie.

During the rest of the week we vowed to build a three stone bench between the two walnut trees in honor of Donnie. We never got around to it; we had to finish the fence. Will had to go back to college. We stopped at the top of the hill as we left the field the last time and looked back to admire our work. At least we had erected some monument to mark our existence. A large shadow flashed over the hood of the Ford pick-up and landed in the tall fescue 20 feet away. He was some type of hawk. I have consulted probably a dozen bird books over the years and have yet to identify this genus of hawk. He had the raptors' downward, curving beak; grasping, yellow talons; and piercing, yellow eyes. The breast was light colored with dark ticking. His wings were light and dark brown. Like all of the Buteo genus, he was formed to float in the air with hollow bones, but he did not have the red tail nor characteristic smooth crown of our local hawks. Instead, his head was tufted like an osprey, but the color of bronze. Unlike every other hawk that kept a half mile out of range of man, this one deliberately stood in the grass 20 feet from the truck. The hawk watched intently and walked toward me after I exited the truck. Neither of us spoke. Eventually, as darkness gathered up from the ground, he got frustrated and jumped up into a large dead poplar tree. He talked to us in a sharp, high cry, "Kee-ah," which I jokingly took to mean "Good job." "Thanks," I laughed and drove off.

That night I told my wife what I had

seen. I was puzzled. Of purer Celtic ancestry, she quickly identified the hawk as Donnie's spirit come to look after me henceforth. She then went back to her needlework. Why hadn't I thought of that? My acceptance of the supernatural must have been bred out of my genes by all the German and French women that had intermarried with my Scotch and Welsh forebears. I've thought about her revelation for years.

Will had to go back to college. I was now alone to bush hog the back fields along the fence line anytime I wanted. I was three months behind in my work and the weeds I had hoped to cut down before their going to seed were still standing. In the too short weekend winter days of January I tried to cover too much ground too fast with the tractor. Donnie had told me I should always go slow in order to get a good cut when I bush hogged. I had disobeyed his order and paid the price for my impatience.

Somewhere in the foot-high fescue field I had just bounced over, I lost part of the lift arm assembly to the 3-point hitch of my bright orange tractor. The lift arm is the part of the tractor that attaches to whatever it's pulling. It is strong and big enough to pick the entire 5,000-pound implement off the ground. The vibration caused a lock nut to loosen and an 18-inch forearm-sized piece of orange-colored steel disappeared into the grass along with two 6-inch long eye bolts and nuts that held the assembly in place. Even though it was winter, the grass was still deep green. I was unaware the parts were gone until I finished my outside-to-inside spiral cutting of the field. Upon trying to leave the field, I found I could not raise the lift arm assembly to pick up the bush hog. It was dark. I knew no one would ever find those lost parts again, even if it were full daylight and even if the searcher were not color blind; the grass was too tall, too thick. I knew I would have to wait until the next Saturday to go to the farm equipment dealer in town to look up the part numbers in his catalogue so he could order new parts. Who knows how long it would take before I would get the order. Who knows when I could get back in the field to finish my work.

On Saturday I stopped at the tractor shed to make a list of all the lost parts I needed to order. I did not have to make that list. Neatly stacked on the flat steel deck of the bush hog were all the missing parts. No one was around. There was no note from any finder. I had no other neighbors but Donnie since the farm was bounded on two sides by creeks and the other two sides by roads. I did hear in the distance the "kee-ah, kee-ah" of a hawk in the wind. I looked up and noticed there were now two hawks in the sky where there had only been one on the farm for years before. One hawk had a bronze head.

Will got married many years ago and went back to yet another university to change careers again. He became an architect this time. He never worked on the farm again. Bell married and built a house on the Corbett land overlooking the spot where I had first seen the hawk by my truck. I never told her of these events. My girls are all grown and gone. They like the farm now. I continued to farm after I retired from the law until I got too old to put the heavy machinery on and off the orange tractor, but I still mow my fields twice a year to keep the weeds out. Even after all those years since Donnie died, I can still hear his tractor approaching every time my tractor stops, but that mystery would be understandable even to Will. I posed that same question to Will at his wedding, "If I can hear Donnie's tractor, who is to say he's not there?" Will replied, "It's just the wind carrying the sound from someone else's tractor up the hollow."

However, the deeper mystery would take us more study. "Well then, Will," I asked, "Did the wind find the tractor parts, fly them half a mile, and stack them neatly on the mowing deck?" Scientific theory was baffled and Will spoke no answer. He studied on that conundrum a while and returned to his philosophical roots. His half-joking thesis began by his proposal that the hawk had the physical ability to find the parts, pick them up, and stack the parts on the tractor, but Will couldn't accept the premise that it was Donnie's spirit in the hawk that directed the task.

"Well, young man, are you saying you do not believe there is such a thing as spirit?" I asked. He hesitated, "Not yet, but what's your answer, Casey?" he said, trying to put me off. My answer was a question back to him, "How do you define, measure, or test love?" "You don't," he replied. "You can't, you just know it's there." "Well then, son, if you know love exists, why not spirit?" I had him now. At least for a while he began to believe that Donnie's spirit was in the hawk and it was Donnie that directed the hawk to bring the lost parts back. I still believe it. In fact, I now know it.

I saw the second hawk for years thereafter every time I would crank up my tractor. "Hello, Donnie," I would say aloud, "thanks for your friendship. I'll try not to lose anything today, but if I do, put the parts in the usual place. By the way, what do you think of the line fence?"

"Kee-ah." ■

Tom Keith of Greensboro earned his BA degree from UNC-Chapel Hill, and his JD degree from Wake Forest University School of Law. He has worked in private practice, and has served as a prosecutor including five terms as solicitor for Forsyth County. Donnie's Hawk is the first story he has written since English 21 at UNC, circa 1962.

Lincoln-Douglas Debates (cont.)

states, such as Ohio, Indiana and Missouri were openly discussing secession from the Union, and he asked Douglas to use his popularity in these states to hold them from secession. Douglas began making pro-Union speeches, several a day, in cities along the disputed area. Exhausting himself, he developed pneumonia and died in 1861. On his deathbed he was asked if he had a message to send to his two sons, and he told them, "Obey the laws and support the Constitution." This is also the epitaph on his tombstone.

R. D. Douglas Jr is a great-grandson of Stephen A. Doglas. He has practiced law in Greensboro since 1936 and is still at it. For North Carolinians, it might be interesting to note that Senator Douglas' oldest son was Robert Martin Douglas, who practiced law in Greensboro and served on the North Carolina Supreme Court. His grandson, Robert Dick Douglas, was attorney general of North Carolina and also practiced in Greensboro. Two great great-grandsons, M. Douglas Berry and Robert D. Douglas III, are current Greensboro attorneys.

Not What Atticus or Jesus Would Have Done!

By Melvin F. Wright Jr.

Remember in *To Kill a Mockingbird* when Bob Ewell spat in the face of Atticus Finch after Atticus had exposed Ewell and his daughter, Mayella, for being untruthful regarding the rape allegations against Tom Robinson? And do you remember that Atticus put his hands in his pockets and walked off? Remember in the Biblical book of Mark when Jesus was spat upon and he did nothing in retaliation? At a recent professionalism CLE program, a lawyer admitted taking a different path.

The speakers at this program were invited to talk about professionalism pet peeves or other incidents that would emphasize the importance of professionalism. When this particular speaker started his presentation, he said that he was not proud of what he was about to say; he further said that the statute of limitations had definitely run on the incident. That was a big red flag that something out of the ordinary was about to be confessed.

This lawyer revealed that 20-plus years ago, he had gone to see an appointed client in lockup. There were other defendants in the lockup cell, and they were monitoring and mocking everything that was going on between the lawyer and his client. After a heated exchange between the two, the client spat on his lawyer. This greatly shocked and enraged the lawyer and was further amplified by the other inmates, noting in a loud and boisterous manner that the "client just spat on his lawyer." The lawyer admits that he should have walked away from the situation and cooled down, but he did not. The client jumped back after spitting on the lawyer as the lawyer reached through the bars trying to grab the client. Finally, the lawyer enticed the client to return to the front of the cell, and after a few minutes (have you guessed what is coming?), the lawyer spat on his client.

As shocked as this lawyer and his client were over 20 years ago as they exchanged spit, they were not as surprised as the 75 or so lawyers listening to this story at the professionalism program. I had bowed my head and was looking at the floor when I realized how this story was going to end. When I looked up, I saw shock on the faces of many in attendance, a law professor shaking her head, and others sheepishly smiling because they did not know what to say or how to respond to this confession by one of their own. This was not the expected professionalism war story we are used to hearing. One lawyer came up to me after the program and laughingly repeated the famous punch line from a familiar joke, "I don't believe I would have told that."

But there are plenty of lessons to be learned here. The lawyer was not proud of what he had done. He recognized that his conduct was unprofessional and, therefore, it has remained in his mind for more than 20 years; however, he was willing to share the story to benefit other lawyers.

Let's consider a few professionalism lessons illustrated here:

1. Clients are not always interested in professionalism, but lawyers should be.

2. Unprofessional conduct often occurs in a split second in response to unwarranted actions toward you. Each of us has to anticipate that we will be faced with unprofessional conduct from time to time and be ready to deal with it in a professional manner.

3. Initial interaction with a client will shape your relationship throughout the entire representation period. Let the client know that you will be a zealous but honorable advocate on his or her behalf.

I hope you will never be confronted with a similar situation; however, if you are, remember this story and choose a path which will be respectful and professional. Chief Judge John Martin, NC Court of Appeals, says, "How true this story could be for any of us who have learned professionalism by trying to live it—and may have made mistakes along the way."

If you make a mistake and fall, get up, dust yourself off, apologize if warranted, and do better next time. ■

Melvin F. Wright Jr. is the executive director of the Chief Justice's Commission on Professionalism.

Would You Like Fries With That?

By Suzanne Lever

Given the current state of the economy, law firms are looking for ways to expand their business opportunities. One approach is for the law firm to begin offering law-related services. Law-related services consist of services that "might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." Rule 5.7(b). Sometimes called ancillary businesses, law-related services range from financial planning to lobbying to psychological counseling.

There are many ethical issues a law firm should consider when deciding to offer law-related services. An initial consideration should be whether to offer the services "in-house" or through a separate entity. When law-related services are provided under circumstances that are not distinct from the provision of legal services (in-house), the law firm will be subject to all of the Rules of Professional Conduct with respect to the provision of the law-related services. The primary ethical concerns present in such an arrangement are avoiding conflicts of interest and maintaining client confidentiality.

If the law-related services are provided by a separate entity, the law firm will still be subject to all of the Rules of Professional Conduct *unless* the law firms takes "reasonable measures" to ensure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the lawyer-client relationship (i.e., the protection of client confidences, prohibition against representation of persons with conflicting interests, protection of the attorney-client privilege, and obligation of a lawyer to maintain professional independence) do not exist. *See* Rule 5.7(a)(2). The communication should be made before entering into an agreement for provision of or providing law-related services. It is best if the communication is in writing. Rule 5.7, cmt. [7]. Remember that a lawyer is always subject to those ethical rules that apply generally to a lawyer's conduct, irrespective of whether the conduct relates to the provision of legal services. Rule 5.7, cmt. [3].

The decision of whether to provide the law-related services internally or through a separate entity also implicates the law firm's duties when referring legal clients to the ancillary business. Referrals of clients from the law firm to a separate law-related business in which the lawyer has an ownership interest constitute business transactions with a client and are subject to the requirements of Rule 1.8(a) (the transaction must be fair to the client, the lawyer must explain the terms of the relationship in writing, and the client must consent in writing and have the opportunity to consult with independent counsel.) When law-related services are provided in-house, the law firm does not have to comply with Rule 1.8(a).

Regardless of whether the law-related services are provided as an in-house service or through a subsidiary of the law firm, the law firm must comply with Rule 1.7(b) regarding conflicts of interest caused by a lawyer's financial interests. In 2000 FEO 9 the Ethics Committee held that a lawyer who was also a certified public accountant could provide legal services and accounting services from the same office. The opinion cites Rule 1.7 and provides that the lawyer may offer accounting services to his legal clients, provided the lawyer fully discloses his self-interest in making a referral to himself and the lawyer determines that the referral is in the best interest of the client. The opinion, in reliance on Rule 7.3, also permits in-person solicitation of the business customers for legal services, but only if a "prior professional relationship" had been established.

2000 FEO 9 also touches on the issue of whether a law firm and an ancillary business can advertise together. The opinion holds that advertisements for the lawyer's services may indicate that the lawyer offers both legal and accounting services, subject to any requirements of the State Board of Certified Public Accountant Examiners.

The law firm must also be careful to avoid violations of Rules 5.3, 5.4, and 5.5. Pursuant to Rule 5.4, lawyers are prohibited from sharing legal fees with a nonlaywer or from forming a partnership with a nonlawyer, if any of the activities of the partnership consist of the practice of law. In RPC 238, the ethics committee held that a lawyer specializing in estate planning could employ a nonlawyer financial advisor so that the law firm could offer its clients financial planning. The opinion states that the nonlawyer financial advisor may be an employee of the law firm but may not become a partner, shareholder, or otherwise own an interest in the law firm and that legal fees may not be shared with the nonlawyer employee.

RPC 238 also cautions that the law firm must have in effect measures giving reasonable assurance that the conduct of a nonlawyer financial advisor will be compatible with the lawyer's professional obligations. Rule 5.3. In particular, the financial advisor may not be held out as offering legal services. Rule 5.5 Also, reasonable measures must be taken to explain to the client that the financial advisor is a nonlawyer who cannot provide legal advice.

If your law firm is thinking of moving towards a "value meal" approach to providing legal services, carefully consider how the ancillary business(es) will be structured. Specifically, the law firm should consider (1) whether the services will be provided in-house or through a separate entity; (2) if the firm will use a separate entity, whether the entity will be wholly or partially owned by the law firm; (3) if the law firm will use a separate entity, and will not have 100% ownership, whether the remaining owners will be lawyers or nonlawyers. ■

Suzanne Lever is assistant ethics counsel for the North Carolina State Bar.

IOLTA Faces Difficult Economic Times

Income

Though we were saved from the significant income decreases reported by IOLTA programs around the country during 2008, we are now experiencing steep income decline. The income decrease is a result of the economic downturn, which has meant unprecedented low interest rates being paid on lower principal balances in the accounts.

In the first quarter, income from IOLTA accounts was down by 52% and investment income (from funds held with the NC State Treasurer) was down 30%. We are seeing no improvement in the second quarter and, in fact, investment income has declined further—by 40% and 51% in April and May, respectively.

Grants

As previously reported, the NC IOLTA trustees decided to keep total grants flat for 2009 at $4.1 million, and move income increases for 2008—resulting from implementing mandatory IOLTA—into reserve so those funds will be available to help keep grants steady for 2010. The IOLTA trustees added a total of $750,000 of 2008 funds to reserve. This decision puts our reserve over $2.5 million, or over half of our current annual grant total.

Grant applications for 2010 will be available in August. Completed applications will be due by October 1 for consideration at the NC IOLTA grant-making board meeting in December.

State Funds

During the 2008 calendar year, NC IOLTA administered over $6.3 million in state funding for legal aid on behalf of the NC State Bar. The legal aid programs are working to sustain the state funding for legal aid work, which is even more necessary during the economic downturn. And, the Equal Access to Justice Commission, Equal Justice Alliance, and the NCBA are pressing for increased state funding to meet the needs of the poor which are increasing during this economic crisis.

Celebrating our History

NC IOLTA is celebrating its 25th anniversary in 2009. To honor the occasion, the NC State Bar *Journal* is publishing a three-part series of articles on NC IOLTA. The first article (in the Spring 2009 issue) focused on the program's establishment and its exceptional leadership throughout its history. The Summer edition included an article on the ups and downs of IOLTA income over the years. The final article—included in this issue—highlights some of the program's grant-making.

An article focusing on the importance of our relationship with North Carolina banks over the years will be published in the next issue of the NC Bankers Association's publication.

NC IOLTA Trustees and Leadership

At their long range planning/orientation board meeting in September, NC IOLTA will welcome three new IOLTA trustees, appointed by the NC State Bar Council, to begin three-year terms on September 1, 2009. The council appointed Michael A. Colombo, former NCBA President who is in private practice in Greenville; F. Edward Broadwell Jr., chairman and CEO of Home Trust Bank in Asheville and former chair of the NC Bankers Association; and Irvin W. (Hank) Hankins III, immediate past-president of the NC State Bar, who is in private practice in Charlotte. Larry S. McDevitt of Asheville was appointed chair of the NC IOLTA Board and Robert A. Wicker was appointed vice-chair for 2009-10.

Considering Comparability

In 2008, NC IOLTA became one of 40 jurisdictions implementing a mandatory IOLTA program, thereby increasing funding available to meet the Bar's obligation to ensure equal access to justice. NC IOLTA income increased by 16% in 2008, despite the unprecedented low interest rates being paid on lower principal balances in trust accounts due to the economic downturn. Absent the move to a mandatory program,

NC IOLTA estimates there would have been a 12% decrease in income for 2008.

Over the last several years, many jurisdictions (27 at last count) have further increased IOLTA income significantly by implementing a comparability requirement—requiring lawyers to hold IOLTA accounts only at participating banks that have agreed to pay rates on IOLTA accounts that are comparable to rates paid on other similar accounts. NC State Bar President John McMillan has made exploring a comparability requirement for NC IOLTA a goal of his presidency, and the concept is supported by NCBA leaders and the NC Equal Access to Justice Commission.

NC IOLTA trustees engaged a consultant whose analysis of our program determined that, under comparability, significant increases could be projected for the future and recommended that North Carolina should begin the process of changing to

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Profiles in Specialization—Jill Raspet

An Interview by Denise Mullen, Assistant Director of Legal Specialization

I recently had an opportunity to talk with Jill Raspet, a board-certified specialist in Wilmington. Jill graduated from the University of North Carolina at Wilmington with a degree in accounting and is a certified public accountant (CPA). She received her JD from Wake Forest Law School in 2002 and practiced in Greensboro until 2007, when she joined Smith Moore Leatherwood and relocated to Wilmington. Jill achieved her board certification in estate planning and probate law in 2008. Following are some of her comments about the specialization program and the early impact it has had on her career as well as her expectations for the future.

Q: Why did you pursue certification?

My view of lawyers was shaped by what I saw on television, so I thought they were always in the courtroom. When I figured out that you could be a lawyer without litigation, I knew that was something I wanted to do. I knew I enjoyed finances and tax, and the summer before law school I worked with an estate planning attorney, Kent Schenkel, and fell in love with the practice. I'm glad that it worked out that way, because being both a lawyer and a CPA has been a really good fit for me. Adding the board certification in estate planning and probate law benefited my career path.

Q: Why did you pursue certification?

When I began working as a lawyer in Greensboro, it was an expectation to pursue certification at the firm where I was. All of the attorneys practicing there in my area were board-certified specialists and I saw what it did for their practices. I knew it was a goal that I was working towards, following the path of my mentors.

Q: How did you prepare for the examination?

I completed the North Carolina Bar Association Estate Planning and Probate Survey Course and found that to be very helpful. I also reviewed prior continuing legal education (CLE) course materials. I took notes to condense chapters into outlines and then studied those on the weekends.

Q: Was the certification process (exam, references, application) valuable to you in any way?

Yes, in particular, the review for the exam. The exam was comprehensive and covered things I do every day as well as a few things that I rarely see in my practice. It was good to commit some of those items to memory rather than relying on looking them up as needed. The exam was challenging, but I took it on the computer and that worked well. I was able to cut, paste, and edit my answers, which made it much more efficient from a time standpoint than I imagine handwriting the exam would have been.

I also contacted the lawyers that I listed for peer review while I was completing the application process. I was able to make sure they could provide a reference and ask them about the certification program and for any study tips for the exam. When the whole process was complete and I found out that I had passed the exam, I wrote them each a thank you note, letting them know the results. That provided a great opportunity to deepen those professional relationships.

Q: How do you envision certification being helpful to your practice?

It already has been! Given my age, it has been very helpful in assuring clients and potential clients that I do know this practice area. I can say that the North Carolina State Bar says that I am a specialist in this field of the law. I know that gives my clients a lot of confidence in my work.

When I passed the specialization exam, my firm also sent out announcements to all of our referral sources and clients. My practice has really taken off since.

Q: Who are your best referral sources?

Other board-certified specialists, including Frank Martin, a specialist in real property law who practices with me, have referred

quite a few clients to me for assistance. I also receive a lot of referrals from other local attorneys, bankers, and financial advisors as well as satisfied clients.

Q: How do you think your certification will benefit your clients?

In addition to the clients' increased confidence in my work, I believe that the higher number of CLE hours required provides a real benefit to clients. By completing more CLE courses each year, I learn about a variety of options that could work for different clients' needs. I am able to use that advanced knowledge to provide better counsel to my clients.

Q: Are there any hot topics in your specialty area right now?

We are all waiting to see what happens with the estate tax laws at the end of the year. The current law states that the estate tax is repealed in 2010 but returns in 2011 as it was in 2001. We anticipate a change, hopefully by year end. We are trying to be very flexible in drafting our documents so that we can accommodate any changes that are made.

Q: Is certification important in your practice area?

I definitely think so. In estate planning and administration, there are so many particular details that, if you're not heavily concentrated in the practice area, it would be very difficult to advise a client appropriately. I also use the directory of legal specialists quite a bit myself to make referrals. If I have a conflict with a potential client, or a client who needs assistance outside of my practice area, I always use the directory to find a referral.

Q: Is certification important in your region?

Yes, there are not a lot of board-certified specialists in the Wilmington area, particularly in estate planning and probate law, and I think I am the only female. There are so many retirees here, including a lot of widows. In some cases it's easier for them to feel comfortable with a female attorney as they transition to full responsibility for their finances.

Q: How does specialization benefit the profession?

The certification program helps clients to make informed choices about selecting a lawyer, and it helps lawyers to market their practices and to stay current in their fields. I would imagine that the increased CLE requirements and focus on specific practice areas would lead to a much lower rate of malpractice problems for board-certified specialists.

Q: What would you say to encourage other lawyers to pursue certification?

Becoming a board-certified specialist provides so many benefits to your practice, it allows you to market yourself and gain a much deeper knowledge of your practice area. The process is not as daunting of a task as you may think, and the benefits to taking the classes and reviewing the material are well worth it. ■

For more information on the State Bar's specialization program, please visit us on the web at www.nclawspecialists.gov.

In Memoriam

Garrett D. Bailey
Burnsville

David M. Britt
Cary

Robert H. Butler
Fayetteville

Harry E. Canaday
Benson

George C. Collie
Charlotte

Robinson O. Everett
Durham

Max F. Ferree
Wilkesboro

Edwin J. Hamlin
Raleigh

Linda J. Hartwell
Greensboro

Robert A. Hedrick
Raleigh

Clifton E. Johnson
Charlotte

Robert E. Lock
Jacksonville

M. L. Lowe
Caroleen

Marshall McCallum Jr.
Charlotte

Arnold B. McKinnon
Norfolk, VA

Thomas C. Morphis
Hickory

John R. Mull
Morganton

Silvy A. Murphy
Cary

Charles J. Murray
Raleigh

Deborah L. Parker
Winston-Salem

John B. Regan III
Supply

Thomas C. Ruff
Charlotte

Robert G. Sanders
Charlotte

Annual Meeting

You are asked to take notice that the annual meeting of the North Carolina State Bar will be held on Friday, October 23, 2009, in conjunction with the council's quarterly business meeting. Further, the council will hold an election on Wednesday, October 21, 2009, at 11:45 a.m. at the Marriott Raleigh City Center, Fayetteville Street, Raleigh, to choose the agency's president-elect, vice-president, and secretary-treasurer for 2009-2010. All members of the Bar are welcome to attend these events.

Bruno's Top Tips for Tip Top Trust Accounting

By Bruno DeMolli

This article is a revised version of an article that was originally published in the Fall 2007 State Bar Journal. *Edward C. Winslow of Brooks Pierce in Greensboro, Kathy Klotzberger, in-house counsel at First Citizens Bank in Raleigh, and Charles Dail, director of deposit operations at First Citizens, provided invaluable assistance and extensive knowledge of the banking system when the original article was published.*

Size Does Matter!

In recent audits of the trust accounts of lawyers randomly chosen from the 2nd and 19B Judicial Districts, I found that ***100%*** of the audited lawyers were not using trust account checks that are business-size and contain the "Auxiliary On-Us" field. In fact, most lawyers were unaware of the requirement which is mandatory and found in Rule 1.15-3(a) of the Rules of Professional Conduct. None of the audited lawyers understood the requirement and many of their bankers were also in the dark.

The requirement is the State Bar's response to the movement in recent years to eliminate paper checks from the national banking system by changing the banking mechanisms used to transfer funds. The State Bar relies upon cancelled paper checks—"showing the amount, date, and recipient of the disbursement, and...the client balance against which [it] is drawn" (Rule 1.15-3(b)(2))—to document withdrawals from a trust account and thereby protect client funds. Simply put, the use of business-size checks with the "Auxiliary On-Us" field in the lower left corner prevents trust account checks from being converted in an ACH transaction from paper to electronic blips as the check moves through banking channels. Here's how:

ACH Transactions

The ACH network is a nationwide system of electronic funds transfers governed by the National Automated Clearing House Association (NACHA), a federation of more than 12,000 financial institutions as well as regional clearing houses around the country. Payments typically made by ACH include direct deposit of payroll, Social Security, other government benefits and tax refunds; direct payment of consumer bills such as mortgages and utility bills; business-to-business payments; e-checks; e-commerce payments; and federal, state, and local tax payments. It is increasingly more common for businesses to convert check payments into ACH transactions for processing. Check conversions are governed by NACHA's Operating Rules which permit check conversions for checks drawn on consumer accounts, but not for business account checks meeting certain requirements. If a debit or credit to an account is initiated through the ACH network, the bank will possess only the transaction data that is required to be submitted into the ACH system with respect to the transaction, typically: the transaction amount, the date the transaction was initiated through ACH, the name of the originating entity and the originating bank, and a reference number. The customer's monthly bank statement will reflect the date, amount, and originating entity as a line item entry on the statement for any ACH transactions into or out of the customer's account for that month. The bank's retention period for such data (apart from what's reflected on the statements) is determined by NACHA's Operating Rules, federal regulations for consumer accounts (Regulation E), and the bank's policies and procedures.

Business-Size Checks

To preserve cancelled trust account checks as the written records of disbursements from a lawyer's trust account, the possibility of unauthorized ACH check conversions must be reduced. NACHA rules state that a check is ineligible for ACH conversion if the check contains the Auxiliary On-Us field, which is an additional field that appears to the left of the bank's routing number in the MICR (magnetic ink character recognition) line of the check. To accommodate this field, the check must be longer than six inches or "business-size." (To see an example of a business-size check look on page 401 of the 2009 State Bar *Handbook* or go to the NACHA website: www.electronicpayments.org/pdfs/AuxOnUsField.pdf.) The trust accounting rules now require all general trust accounts, dedicated trust accounts, and fiduciary accounts to use business-size checks with an Auxiliary On-Us field in the MICR line of the check. *See* Rule 1.15-3(a). Most unauthorized ACH conversions of trust account checks will be prevented by use of business-size checks for all trust accounts.

Unauthorized ACH conversions may occur, on occasion, despite the use of the larger business-size checks. Therefore, the trust accounting rules require that the balance of a general trust account, as shown on the lawyer's records, be reconciled on a monthly basis with the current bank statement balance. *See* Rule1.15-3(e). (Remember, however, that quarterly reconciliations require individual client balances to be totaled and reconciled to the bank statement balance.) In addition to being a sound financial practice, monthly reconciliation of the bank statement helps to insure that unauthorized ACH conversions recorded on the bank statement are discovered at a time when the lawyer may remember the disbursement and still be able to obtain the check from the bank.

Educate Your Banker

If you are not doing so already, please switch to business-size checks with the Auxiliary On-Us field as soon as possible and, if your banker is still in the dark, feel free to share your superior knowledge (and this article) with him or her. ■

The Intelligence of Presence

By Don Carroll

We are all aware of how current economic conditions are affecting the world, our profession, and our own livelihoods. Contractions in the economy often trigger our fears of not having enough and we consequently experience reactive emotional contraction.

At the same time that we are feeling the general and personal impact of the recession, we continue to experience an increasing level of technological distractions in our work and daily life. These distractions come in many forms, but paramount is our tether to a mobile telephone and a mobile internet texting device. When our level of distraction increases to a certain point, our response is also to react emotionally in a protective, contracting manner.

More and more I run into lawyers who are taking medication for Attention Deficit Disorder (ADD). The experts are unclear about what is actually causing the upsurge in diagnoses of ADD. But all seem to agree that we live in a very ADD-inducing culture where the programming in our televisions comes on split screens and in two-and three-second sound bites. The presence and dependence on caffeinated beverages in our daily lives, as well as trying to keep up with almost impossible personal and work schedules, are sure contributors to our ADD culture.

All of these trends come together to a bottom line question: How can we be less distracted, less emotionally constricted, and more present in our lives? Ongoing brain research shows that we live primarily out of pattern-generated templates that are stored in our brains. In other words, when I look out the window, most of what I see is a pattern that my brain imposes about what I think I will see out the window. Our pattern-generating brains work this way out of a need for efficiency. It would take much more glucose and oxygen in my brain to actually allow me to make meaning of what I see out the window if I did not have a mental template stored in my brain about what I think I am seeing. Meaning is created by what we think we're seeing, based on habit, more than what is actually there. The beauty of the way our pattern-forming brain works is that we can perceive, process, and think with enormous speed. This ability is probably a survival-selected trait. The downside is that everything that we see has imposed upon it our internal vision of what we think we are seeing.

When we understand how the brain's patterning process works, and the level of distraction and constriction that we are subject to in our speeded up culture, we get a clearer picture of how our bodies, in the way our brains operate, contribute to our level of emotional stress. Because of our patterning process, reactive emotions play a big part in the way we experience life. Let's take an example. Suppose you have been working all day at the office and plan to meet your spouse after work for dinner. You the lawyer have asked your spouse to make the reservation and your spouse ends up arriving late because of traffic and parking problems. You are afraid you will lose your reservation and you know if you did you would have to wait at least 45 minutes for a table. By the time you are picked up by your spouse you are upset about being late to dinner. On the other hand, your spouse is unperturbed and excited about the chance for the two of you to have an evening out. The two of you get to the restaurant and even though you still get your table, you sit there eating in stony silence, still furious that your spouse was not able to pick you up on time. Your emotional reaction is based on past experience. Some old pattern got triggered. You have a higher need for control than your spouse, particularly when you are tired after a hard day's work. When the uncertainty of keeping the dinner reservation arises you begin to unconsciously feel that your whole evening is somehow out of control and a pattern of emotional contraction is triggered. You have become a victim of your own reactive emotional patterns.

From this little example we can probably see how emotional reactive patterns in our lives reduce the opportunities for happiness and joy, as well as limit our options in the way we experience life. The answer to our brain's survival-driven patterning practice, particularly in

times of economic contraction and technological distraction, is to learn how to be more present so that our lives are not lived out of our emotional reactive patterns.

There is a lot of literature out there these days about being present. Most notable is probably the work of Eckhart Tolle, and particularly his two books, *The Power of Now* and *A New Earth.* I have read them and they both offer a lot of insight and yet, at the same time, there is this practical question of *what does it mean to really be present?* My own understanding is that presence is our capacity to be fully in the moment without being caught in either mental or emotional reactive patterns. This is hard to do. From the discussion of how our brain works, it is apparent that being in the present runs against genetic predisposition and learned habit, which work off of the efficiency of having a built-in patterning process. The trick is to realize that we are capable of experiencing our life outside of automatic patterns (i.e., be present), and that then we can have a choice about which patterns we allow to run on automatic. Teachers like Eckhart Tolle and practitioners of Buddhist psychology recommend the use of meditation as a key practice to learn how to break the automatic grip of emotional reactive patterns.

In meditation, one learns to strengthen a muscle of awareness that allows us to be present without being caught in an old thought pattern or an old emotional pattern about what is happening. The Buddhist tradition has a long history and experience of developing skills about how best to strengthen our natural awareness which leads to presence.

CONTINUED ON PAGE 47

Council Approves Opinion Allowing Audit of Real Estate Trust Accounts by Title Insurers

Council Actions

At a meeting on July 24, 2009, the State Bar Council retracted 2008 Formal Ethics Opinion 14, *Attribution When Using the Written Work of Another*, to permit the publication of a proposed revision of the opinion. The council also adopted the opinions summarized below upon the recommendation of the Ethics Committee:

2008 Formal Ethics Opinion 13

Audit of Real Estate Trust Account by Title Insurer

Opinion rules that, unless affected clients expressly consent to the disclosure of their confidential information, a lawyer may allow a title insurer to audit the lawyer's real estate trust account and reconciliation reports only if certain written assurances to protect client confidences are obtained from the title insurer, the audited account is only used for real estate closings, and the audit is limited to certain records and to real estate transactions insured by the title insurer.

2009 Formal Ethics Opinion 6

Including Information on Verdicts and Settlements on a Website

Opinion rules that a website may include a "case summary" section if there is sufficient information about each case included on the webpage to comply with Rule 7.1(a).

Ethics Committee Actions

At its meeting on July 23, 2009, the Ethics Committee voted to ask the State Bar Council to retract 2008 FEO 14, *Attribution When Using the Written Work of Another*, to allow for the publication below of a proposed revision of the opinion. The committee retracted Proposed 2008 FEO 16, *Advising a Client About Litigation Funding Agreement*, in light of a decision of the North Carolina Supreme Court that rendered the proposed opinion moot. The committee also voted to withdraw and send the following proposed opinions to subcommittees for further study: Proposed 2008 FEO 11, *Representation of Beneficiary on Other Matters While Serving as Foreclosure Trustee*; Proposed 2009 FEO 3, *Non-Lawyer Employee Contacting Clients of Former Employer*; and Proposed 2009 FEO 7, *Interviewing a Child Witness*. One proposed opinion, previously published in the *Journal*, was revised and appears below. Three new proposed opinions are also published for comment. The comments of readers are welcomed.

Proposed 2008 Formal Ethics Opinion 14
Attribution When Using the Written Work of Another
July 23, 2009

Editor's note: The original version of this opinion was adopted by the State Bar Council on January 23, 2009, and withdrawn by the council on July 24, 2009, in order to publish this proposed revision.

Proposed opinion rules that it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer.

Inquiry #1:

Lawyer A submitted a brief to the trial court that contained eight pages, verbatim, from an appellate brief previously drafted and filed by Lawyer B in an unrelated case. Lawyer B does not work for Lawyer A's firm. Lawyer A did not credit Lawyer B for the copied portion of the brief, or obtain Lawyer B's permission to incorporate the eight pages, entirely unchanged, into his own brief. Lawyer A added references to additional relevant case law. Lawyer A properly cited all court opinions, legal treatises, and published or copyrighted works upon which he had relied. The only pre-existing writings included within his brief without attribution were the relevant legal arguments submitted by Lawyer B in an earlier appeal.

Did Lawyer A violate any Rule of Professional Conduct through his unattributed use of eight pages of Lawyer B's brief?

Opinion #1:

No. It is not dishonest or unethical for a lawyer to incorporate excerpts from the written work of another lawyer in a brief or other written document without attribution. No opinion is expressed, however, on the legal question of whether a lawyer has intellectual property rights in the lawyer's written works including briefs, pleadings, discovery, and

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the Rules of Professional Conduct as revised effective March 1, 2003, and thereafter amended, and referred to herein as the Rules of Professional Conduct (2003). The proposed opinions are issued pursuant to the "Procedures for Ruling on Questions of Legal Ethics." 27 N.C.A.C. ID, Sect .0100. Any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. Any comment or request should be directed to the Ethics Committee at PO Box 25908, Raleigh, NC 27611, by September 30, 2009.

Captions and Headnotes

A caption and a short description of each of the proposed opinions precedes the statement of the inquiry. The captions and descriptions are provided as research aids and are not official statements of the Ethics Committee or the council.

Public Information

The Ethics Committee's meetings are public, and materials submitted for consideration are generally NOT held in confidence. Persons submitting requests for advice are cautioned that inquiries should not disclose client confidences or sensitive information that is not necessary to the resolution of the ethical questions presented.

other legal documents.

Lawyers often rely upon and incorporate the work of others when writing a brief, whether that work comes from a law firm brief bank, a client's brief bank, or a brief that the lawyer finds in a law library or posted on a listserv on the Internet. By its nature, the application of the common law is all about precedent, which invites the re-use of arguments that have previously been successful and have been upheld. It would be virtually impossible to determine the origin of the legal argument in many briefs. Moreover, the utilization of the work of others in this context furthers the interests of the client by reducing the amount of time required to prepare a brief and thus reducing the charge to the client. *See* RPC 190 (1994). It also facilitates the preparation of competent briefs by encouraging lawyers to use the most articulate, carefully researched, and comprehensive legal arguments.

When using the work of another, the lawyer must still provide competent representation. Rule 1.1. This means that the lawyer must verify any citations in the excerpt to insure that the content and interpretation of caselaw, statute, and secondary sources is correct.

Although consent and attribution are not required, if a lawyer uses, verbatim, excerpts from another's brief and the lawyer knows the identity of the author of the excerpt, it is the better, more professional practice, for the lawyer to include a citation to the source.

Inquiry #2:

If Lawyer B, or another lawyer, learns that Lawyer A submitted a brief to the court that contained verbatim portions of a brief previously drafted and filed by Lawyer B, does the lawyer have a duty to report Lawyer A to the State Bar?

Opinion #2:

No. *See* Opinion #1 above.

Inquiry #3:

Lawyer A's law firm maintains a "brief bank," consisting of memoranda of law and briefs previously written by members of the firm and filed with trial or appellate courts. Is it a violation of the Rules of Professional Conduct for Lawyer A to use, verbatim, a portion of a memorandum or brief contained in the brief bank without attribution?

Opinion #3:

No. *See* Opinion #1 above.

Inquiry #4:

Is it a violation of the Rules of Professional Conduct for Lawyer A to sign his name to a brief, written by an associate at Lawyer A's direction and under Lawyer A's supervision, without including the associate's name on the brief?

Opinion #4:

No, so long as Lawyer A does not charge the client for work he did not perform.

Inquiry #5:

Is it a violation of the Rules of Professional Conduct for Lawyer A to copy, verbatim and without attribution, clauses from a contract, pleading, discovery request, or other similar document prepared by someone else for use in a similar document that Lawyer A is preparing for a client?

Opinion #5:

No. It is not dishonest or misleading to incorporate such clauses in similar documents without consent of the author or attribution. *See* opinion #1 above.

Inquiry #6:

May a law firm distribute a "canned" newsletter to its clients that is obtained from a commercial publishing company without disclosing that the lawyers in the law firm did not actually author the material?

Opinion #6:

No. If the content of a newsletter is portrayed as the original work of the firm's lawyers, the distribution of the newsletter under the law firm's name, without disclosing the true authorship of the material contained in the newsletter, is misleading and a violation of Rule 7.1(a).

Proposed 2009 Formal Ethics Opinion 1
Review and Use of Metadata
July 23, 2009

Proposed opinion rules that a lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

Background

In the representation of clients in all types of legal matters, lawyers routinely send emails and electronic documents, spreadsheets, and PowerPoint presentations to a lawyer for another party (or directly to the party if not represented by counsel). The email and the electronic documents contain metadata[1] or embedded information about the document describing the document's history, tracking and management[2] such as the date and time that the document was created, the computer on which the document was created, the last date and time that a document was saved, "redlined" changes identifying what was changed or deleted in the document, and comments included in the document during the editing process. Pennsylvania Bar Ass'n. Comm. on Legal Ethics and Professional Responsibility, Formal Opinion 2007-500, *reconsidered* Pennsylvania Formal Op. 2009-100, notes that, although most metadata contains "seemingly harmless information," it may also contain "privileged and/or confidential information, such as previously deleted text, notes, and tracked changes, which may provide information about, e.g., legal issues, legal theories, and other information that was not intended to be disclosed to opposing counsel." This embedded information may be readily revealed by a "right click" with a computer mouse, by clicking on a software icon, or by using software designed to discover and disclose the metadata.[3] On occasion, one software application automatically displays or uses metadata that another software application hides from the user. The sender of the document may be unaware that there is metadata embedded in the document or mistakenly believe that the metadata was deleted from the

document prior to transmission. The Ethics Committee is issuing this opinion *sua sponte* in light of the importance of the ethical issues raised by metadata.

Inquiry #1:

What is the ethical duty of a lawyer who sends an electronic communication to prevent the disclosure of a client's confidential information found in metadata?

Opinion #1:

Rule 1.6(a) of the Rules of Professional Conduct prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by one of the exceptions to the duty of confidentiality set forth in paragraph (b) of the rule. As noted in comment [20] to the rule, "[w]hen transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients." Therefore, a lawyer who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients.[4]

RPC 215 addressed the preservation of confidential client information when using modern forms of communication including cellular phones and email. The opinion states that the professional obligation to use reasonable care to protect and preserve confidential information extends to the use of communications technology; "[h]owever, this obligation does not require that a lawyer use only infallibly secure methods of communication." Nevertheless, "a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication."

Lawyers have several options to minimize the risk of disclosing confidential information in an electronic communication. Lawyers should exercise care in using software features that track changes, record notes, allow "fast saves," or save different versions, as these features increase the amount of metadata within a document. Metadata "scrubber" applications remove embedded information from an electronic document and may be used to remove metadata before sending an electronic document to opposing counsel. Finally, lawyers may opt to use an electronic document type that does not contain as much metadata, such as the portable document format (PDF), or may opt to use a hard copy or fax. Both commercial and freeware software solutions exist to help lawyers avoid inadvertently disclosing confidential information in an electronic communication.

What is reasonable depends upon the circumstances including, for example, the sensitivity of the confidential information that may be disclosed, the potential adverse consequences from disclosure, any special instructions or expectations of a client, and the steps that the lawyer takes to prevent the disclosure of metadata. Of course, when electronic communications are produced in response to a subpoena or a formal discovery request in civil litigation, the responding lawyer may not remove or restrict access to the metadata in the communications if doing so would violate any disclosure duties under law, the Rules of Civil Procedure, or court order.

Inquiry #2:

May a lawyer who receives an electronic communication from another party or the party's lawyer search for and use confidential information embedded in the metadata of the communication without the consent of the other party or lawyer?

Opinion #2:

No, a lawyer may not search for confidential information embedded in metadata of an electronic communication from another party or a lawyer for another party. By actively searching for such information, a lawyer interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship. Rule 1.6. Additionally, if a lawyer unintentionally views confidential information within metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

The New York State Bar was the first to adopt the position that a lawyer should not search metadata for confidential information. The state bars of Alabama, Arizona, Florida, and Maine have followed this position.[5] New York Ethics Opinion 749 holds that,

> in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine, or that may otherwise constitute a "secret" of another lawyer's client would violate the letter and spirit of [the New York] Disciplinary Rules.

Agreeing with the position of the New York State Bar, the Alabama State Bar Disciplinary Commission in Opinion 2007-02 finds that, "[t]he mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party." Although the ABA Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 06-442 (2006),[6] takes the position that the Model Rules of Professional Conduct do not prohibit a lawyer from reviewing and using metadata, this position was subsequently rejected by the State Bar of Arizona among others. Arizona Opinion 07-03 observes that under the ABA opinion, which puts "the sending lawyer…at the mercy of the recipient lawyer…, the sending lawyer might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely…[this is not] realistic or necessary."

The North Carolina State Bar Ethics Committee agrees that a lawyer may not ethically search for confidential information embedded within an electronic communication from another party or the lawyer for another party. To do so would undermine the protection afforded to confidential information by Rule 1.6 and would interfere with the client-lawyer relationship of another lawyer in violation of Rule 8.4(d), which prohibits conduct that is "prejudicial to the administration of justice."

The Ethics Committee recognizes that it is possible for a lawyer to unintentionally find confidential information upon viewing the contents of an electronic communication. If this occurs, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

Rule 4.4(b) requires a lawyer who receives a writing relating to the representation of a client that the lawyer knows, or reasonably should know, was inadvertently sent, to promptly notify the sender. Receiving confi-

dential information embedded in the metadata of an electronic communication is analogous to receiving, for example, a faxed pleading that inadvertently includes a page of notes from opposing counsel. Although the receiving lawyer did not seek out the confidential information, the receiving lawyer in either situation has a duty to "promptly notify the sender" under Rule 4.4(b) if the receiving lawyer "knows or reasonably should know that the writing was inadvertently sent." Although the technology involved is different, the Ethics Committee believes that a lawyer who can recognize confidential information inadvertently included in a fax can also recognize confidential information inadvertently included in an electronic document.

Further, a lawyer who intentionally or unintentionally discovers confidential information embedded within the metadata of an electronic communication may not use the information revealed without the consent of the other lawyer or party.

Although the receipt of confidential information embedded in metadata is analogous to the receipt of a page of handwritten notes in a faxed pleading for purposes of notifying the sender under Rule 4.4(b), metadata differs from the readily apparent information contained in a paper communication. Confidential information may inadvertently be included in the metadata of an electronic document despite reasonable efforts by a sender to stay abreast of rapid technological changes and to prevent the transmission of confidential information. The exchange of electronic documents, however, is vital to the functioning of the legal profession in the twenty-first century. Although Rule 4.4(b) does not require a lawyer to return an inadvertently sent paper document or specifically prohibit the use of information contained in such a document, Rule 8.4(d) prohibits conduct that is "prejudicial to the administration of justice." As comment [4] to Rule 8.4 observes, "[t]he phrase 'conduct prejudicial to the administration of justice' in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings." Allowing the use of confidential information that is found embedded within metadata would inhibit the efficient functioning of the modern justice system and also undermine the protections for client confidences in the Rules of Professional Conduct and the attorney-client privilege. Therefore, the use of found metadata is "prejudicial to the administration of justice" in violation of Rule 8.4(d) and is prohibited.

In summary, a lawyer may not search for and use confidential information embedded in the metadata of an electronic communication sent to him or her by another lawyer or party unless the lawyer is authorized to do so by law, rule, court order or procedure, or the consent of the other lawyer or party. If a lawyer unintentionally views metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

Endnotes

1. Metadata is explained in Pennsylvania Bar Ass'n. Comm. on Legal Ethics and Professional Responsibility, Formal Op. 2007-500 (2007), *reconsidered* Pennsylvania Formal Op. 2009-100 (2009), as follows: "Metadata, which means 'information about data,' is data contained within electronic materials that is not ordinarily visible to those viewing the information. Although most commonly found in documents created in Microsoft Word, metadata is also present in a variety of other formats, including spreadsheets, PowerPoint presentations, and Corel WordPerfect documents."
2. Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 07-03 (2007).
3. Pennsylvania Formal Op. 2007-500 (2007), *reconsidered* Pennsylvania Formal Op. 2009-100 (2009).
4. This is consensus position among the jurisdictions that have considered the issue as well as the ABA Standing Committee on Ethics and Professional Responsibility. Alabama State Bar Disciplinary Comm'n, Op. 2007-02 (2007); Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 07-03 (2007); Colorado Bar Ass'n. Ethics Comm., Op. 119 (2008); District of Columbia Legal Ethics Comm., Op. 341 (2007); Florida Professional Ethics Comm., Ethics Op. 06-2 (2006); Maine Bd. of Bar Overseers Professional Ethics Comm'n., Op. 196 (2008); Maryland State Bar Ass'n. Comm. on Ethics, Op. 2007-09 (2006); New York State Ethics Op. 782 (2004); Pennsylvania Formal Op. 2009-100 (2009); ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 06-442 (Aug. 5, 2006).
5. Alabama Ethics Op. 2007-02 (2007); Arizona Op. 07-03 (2007); Florida Ethics Op. 06-2 (2006); Maine Op. 196 (Oct. 21, 2008); and New York Ethics Op. 749 (2001). District of Columbia Legal Ethics Comm. Op. 341 (2007) holds that a lawyer may not view metadata if the lawyer has actual knowledge that it was provided inadvertently.
6. ABA Formal Op. 06-442 (2006) concludes that the Model Rules of Professional Conduct permit a lawyer to review and use metadata contained in email and other electronic documents. The Colorado Bar Association, Maryland State Bar Association, and Pennsylvania Bar Association agree with the position expressed in the ABA opinion. Colorado Op. 119 (2008); Maryland Op. 2007-09 (2006); Pennsylvania Op. 2009-100 (2009).

Proposed 2009 Formal Ethics Opinion 8
Service as Commissioner after Representing Party to Partition Proceeding
July 23, 2009

Proposed opinion provides guidelines for a lawyer for a party to a partition proceeding and rules that the lawyer may subsequently serve as one of the commissioners for the sale but not the partitioning of the property.

Inquiry #1:

Attorney is retained by a person with an interest in property to represent him in a proceeding to partition the property pursuant to Chapter 46 of the North Carolina General Statutes. N.C. Gen. Stat. §46-6 authorizes the court to appoint a disinterested person to represent any person interested in the property whose name is unknown and who fails to appear in the proceeding. May Attorney represent the existing client and also agree to be appointed to represent any unknown person with interest in the property?

Opinion #1:

No. There is a potential conflict between the interests of the existing client and the interests of the unknown person(s). One of the critical issues in a partition proceeding is whether the property should be sold or partitioned. *See, e.g.*, N.C. Gen. Stat. §46-22(c)(party seeking sale has burden of proving, by a preponderance of the evidence, that actual partition cannot be made without substantial injury to the interested parties). If Attorney has an existing client with a specific interest in the proceeding, Attorney cannot be disinterested as required by N.C. Gen. Stat. §46-6 or exercise independent professional judgment as required by the Rules of Professional Conduct when evaluating and representing the interests of the unknown person(s). The potential conflict cannot be resolved by consent because the unknown person(s) is unavailable to consent. Rule 1.7.

Inquiry #2:

At the conclusion of the proceeding, the clerk of court orders the sale of the property and, pursuant to N.C. Gen. Stat. §46-7, appoints Attorney as one of the three commissioners for the sale. May Attorney serve as one of the commissioners and collect a commission from the sale?

Opinion #2:

Yes, provided Attorney concludes that he can serve fairly and impartially. The role of the commissioner is a neutral one with fiduciary responsibilities to all of the owners of the property. However, a commissioner conducting a public sale has limited discretion because he must follow the specific procedural requirements for judicial sales set forth in Chapter 1, Article 29A of the General Statutes. Attorney may, therefore, serve as commissioner for the sale upon determining that he can fulfill the role impartially and without bias for or against any of the parties to the partition proceeding. In the similar situation of a lawyer serving as a trustee on a deed of trust in foreclosure, the opinions also allow the lawyer to relinquish the representation of the lender or the debtor to serve in the impartial fiduciary role of trustee for the foreclosure. *See* RPC 46, RPC 82, RPC 90.

Inquiry #3:

May Attorney purchase the property at the sale?

Opinion #3:

No. As an appointed commissioner, Attorney has a duty to oversee the sale of the property in a fair and impartial manner. Advancing a personal interest by bidding on the property violates this duty. *See* 2006 FEO 5 (county tax lawyer who is appointed commissioner may not bid at tax foreclosure sale).

Inquiry #4:

At the conclusion of the proceeding, the clerk of court orders the partition of the property. May Attorney agree to be appointed as one of the three commissioners responsible for dividing the property?

Opinion #4:

No. A commissioner for a partitioning must exercise discretion in determining how to divide the property, thus directly affecting the interests of the various parties to the proceeding. Moreover, there remain opportunities for Attorney to advocate for his client's interests in the event the commissioners seek input from the parties or in the event of an appeal. Attorney cannot, therefore, serve as an impartial commissioner. Rule 1.7(a).

Inquiry #5:

Assume that Attorney formerly represented one or more of the parties in a separate but related partition proceeding (i.e., a prior proceeding involving the same property that did not result in partition or sale), but does not represent any of the parties to the current proceeding.

May Attorney serve as one of the commissioners to conduct the sale or to partition the property?

Opinion #5:

Yes, provided Attorney determines that he can act impartially. *See* Opinion #1 and Rule 1.7.

Inquiry #6:

Assume that Attorney formerly represented one or more of the parties in a separate but related partition proceeding (i.e., a prior proceeding involving the same property that did not result in partition or sale), but does not represent any of the parties to the current proceeding.

May Attorney serve as the court-appointed lawyer for any "unknown owner" pursuant to N.C. Gen. Stat. §46-6?

Opinion #6:

Yes, with the informed consent, confirmed in writing, of Attorney's former client(s). Rule 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from representing a new client in the same or a substantially related matter if the interests of the new client are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

Inquiry #7:

Assume that Attorney formerly represented one or more of the parties in a separate but related partition proceeding (i.e., a prior proceeding involving the same property that did not result in partition or sale), but does not represent any of the parties to the current proceeding.

May Attorney purchase the property at the sale?

Opinion #7:

Yes, unless Attorney received confidential information from a former client relative to the property that Attorney could use to the former client's disadvantage when bidding on the property. Rule 1.9(c)(1).

If a lawyer no longer represents a former client, the lawyer's only duties to the former client are to avoid adverse representations of others in the same or a substantially related matter and to avoid using confidential client information to the disadvantage of the former client. Although the partition sale may be substantially related to the prior partition proceeding, a lawyer who is purchasing for his own interest is not engaged in the representation of an adverse party and, therefore, the prohibition on representations adverse to a former client in Rule 1.9(a) is inapplicable. However, the prohibition on using the confidential information of a former client to the disadvantage of the former client would apply unless, as Rule 1.9(c)(1) permits, the information has become generally known.

Proposed 2009 Formal Ethics Opinion 9
Computer-Based Conflict Checking Systems
July 23, 2009

Proposed opinion describes reasonable procedures for a computer-based conflicts checking system.

Inquiry:

For the past several years Law Firm has maintained information with regard to current and former representations in electronic form on its computer network and used software tools in order to query such data to determine whether prospective engagements would involve a conflict of interest. Law Firm has learned that its current software provider will no longer provide support for the conflict checking system. A new software provider will convert the data to a new, fully supported program for a certain dollar amount per year of data converted. With each additional year that the software provider is required to retrieve the data, the expense of the conversion goes up exponentially. For what period of time is Law Firm required to convert the data necessary for conflict checking purposes?

Opinion:

After termination of a client-lawyer relationship, a lawyer has continuing duties with respect to confidentiality and conflicts of interest. *See* Rule 1.6; Rule 1.9, cmt. [1]. These duties continue indefinitely, even after

a client's death. *See* RPC 209. For example, in RPC 209, the Ethics Committee determined that, although six years is a reasonable amount of time for maintaining a closed client file, a law firm must indefinitely maintain a record of all destroyed client files. Similarly, the American Bar Association has opined that a lawyer should preserve, "perhaps for an extended time," an index or identification of destroyed client files. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1384 (1977).

Despite the indefinite duration of the duties with respect to confidentiality and conflicts, the requirements for complying with these duties must be reasonable. *See* Rule 0.2, Preamble: Scope. The Ethics Committee has previously adopted the standard of "reasonable care" in addressing a lawyer's duty to maintain client confidences. *See* RPC 133, RPC 215. Likewise, comment [3] to Rule 1.7 specifically provides that a law firm should adopt "reasonable procedures" in order to determine whether a conflict of interest exists.

Every law firm must make its own determination as to what conflict checking procedures are reasonable, taking into account such variables as the size of the law firm, the type of practice, the cost of maintaining conflict checking records over a period of time, and the risk of failing to discover an existing conflict of interest. Regardless of the amount of time that conflict checking information is maintained, lawyers have a duty to avoid any known conflicts and to address conflicts made known to them by opposing or third parties.

As a minimum standard for what constitutes reasonable care, the law firm must convert conflict checking data for at least the last six years to the new program. RPC 209. The law firm does not need to convert conflict checking data that is maintained in some other format by the law firm, i.e., index card filing system, so long as the firm has some means of searching the data for conflicts. The law firm should check with its malpractice carrier to determine whether the carrier has different requirements.

Proposed 2009 Formal Ethics Opinion 10
Supervising a Nonlawyer Appearing in an Unemployment Hearing
July 23, 2009

Proposed opinion rules that a lawyer must provide appropriate supervision to a nonlawyer appearing pursuant to N.C. Gen. Stat. §96-17(b) on behalf of a claimant or an employer in an unemployment hearing.

Inquiry #1:

N.C. Gen. Stat. §96-17(b) allows a nonlawyer to represent employers in unemployment hearings provided the non-lawyer is supervised by a North Carolina licensed lawyer. The statute does not require the lawyer to be present at the unemployment hearing:

> (b) Representation - Any claimant or employer who is a party to any proceeding before the [Employment Security] Commission may be represented by (i) an attorney; or (ii) any person who is supervised by an attorney; however, the attorney need not be present at any proceeding before the commission.

Attorney A is contacted by Corporation B, a business entity that would like to have its employees represent employers in unemployment hearings. As stated in a letter to Attorney A, Corporation B is looking for a lawyer to supervise the "corporation, its employees, and agents" in the representation of employers in unemployment hearings in North Carolina. May Attorney A accept and provide Corporation B with a letter of supervision that would indicate that Attorney A is supervising the corporation and its employees in the representation of employers in unemployment hearings?

Opinion #1:

No. N.C. Gen. Stat. §84-5 prohibits the practice of law by a business corporation. Rule 5.5(d) prohibits a lawyer from assisting in the unauthorized practice of law. Attorney A may not agree to supervise Corporation B or its employees and may not provide a letter of supervision to Corporation B.

Inquiry #2:

If Corporation B were not a corporation but another form of business entity, would the answer to Inquiry #1 change?

Opinion #2:

No.

Inquiry #3:

Attorney A is contacted by C, a nonlawyer who would like to act as a claimant's or an employer's representative pursuant to N.C. Gen. Stat. §96-17(b). C asks Attorney A to give her a letter of supervision "for any and all unemployment hearings." The requested letter would not be limited to a specific pending unemployment claim, but would be used for any claim upon which C might represent a claimant or an employer in the future. On a periodic basis, C would provide Attorney A with a list of claims upon which she provided representation.

May Attorney A provide the letter of supervision to C?

Opinion #3:

Unless Attorney A will provide appropriate supervision to C in every unemployment hearing in which she appears, Attorney A may not provide the letter of supervision.

Although N.C. Gen. Stat. §96-17(b) does not require the lawyer to be physically present at a hearing, it contemplates that a lawyer will supervise a nonlawyer representative. Moreover, Rule 5.3 requires a lawyer to supervise the conduct of any nonlawyer who is retained or associated with the lawyer. Therefore, the lawyer must provide appropriate supervision under the circumstances. *See* RPC 216 (lawyer may supervise nonlawyer who is not employee, but lawyer is responsible for work product). Appropriate supervision would include determining the ability and knowledge of the nonlawyer before agreeing that the nonlawyer may appear at a hearing without the lawyer. Tt would also require the lawyer to have specific knowledge of and provide oversight for each claim to be handled by the nonlawyer.

A "letter of supervision" that represents that a lawyer is supervising a nonlawyer must be a truthful communication as required by Rule 7.1. If Attorney A is not going to supervise C with regard to each individual unemployment hearing, then the letter is a sham and Attorney A is assisting C in the unauthorized practice of law.

Inquiry #4:

C asks Attorney A to prepare and sign a letter of representation for C with blank spaces so that C may fill in the blanks with the identifying information for each hearing in which she represents an employer. May Attorney A provide such a letter?

Opinion #4:

See Opinion #3. ■

Amendments Pending Approval by the Supreme Court

At its meetings on October 24, 2008, and January 23, 2009, the State Bar Council voted to adopt the following amendments for transmission to the North Carolina Supreme Court for approval (for the complete text of the proposed amendments, see the Fall 2008 and Winter 2008 editions of the *Journal* or visit the State Bar website: www.ncbar.gov):

Proposed Amendments to the Rules on Discipline and Disability

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

The proposed amendments to the discipline rules revise and replace the existing rule limiting the time period for filing grievances and provide guidelines for the Grievance Committee and for the Disciplinary Hearing Commission when imposing discipline.

At its meeting on April 24, 2009, the council voted to adopt the following amendments for transmission to the North Carolina Supreme Court for approval (for the complete text of the proposed amendments, see the Spring 2009 edition of the *Journal* or visit the State Bar website: www.ncbar.gov):

Proposed Amendments to the Rules on Discipline and Disability

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

The proposed amendments provide for enhanced disciplinary sanctions as a function of prior discipline.

Proposed Amendments to the Discipline and Disability Rules to Change Terminology

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

Participants in the disciplinary system and observers occasionally become confused when trying to distinguish between the hearing "committees" of the Disciplinary Hearing Commission (DHC), the commission as a whole, and the Grievance Committee. To reduce this confusion, the word "panel" is substituted for the word "committee" whenever the latter word is used in this section to refer to a three-member panel of the DHC presiding over a public hearing.

Proposed Amendments to the Procedures for Administrative Suspension

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

Proposed amendments to the rules on administrative suspension for failure to timely fulfill a duty of membership (e.g., pay membership dues, complete annual CLE, return CLE annual report form, etc.) require a lawyer who is served with an order of suspension to wind-down his or her law practice within 30 days after the order goes into effect. The wind-down obligations are the same as those imposed when a lawyer receives a disciplinary suspension or is disbarred. Under the proposed amendments, if a lawyer under administrative suspension fails to fulfill the wind-down obligations, the member is subject to professional discipline.

Other proposed amendments eliminate the recitation of the obligations of membership enforceable under the administrative suspension rule in favor of a generic reference thereto and eliminate the requirement of service pursuant to Rule 4 of the Rules of Civil Procedure in favor of service by registered or certified mail at the member's last address on record with the State Bar.

At its meeting on July 24, 2009, the council voted to adopt the following amendments for transmission to the North Carolina Supreme Court for approval (for the complete text of the proposed amendments, see the Summer 2009 edition of the *Journal* or visit the State Bar website: www.ncbar.gov):

Proposed Amendments to the Regulations Governing the Administration of the Continuing Legal Education Program

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

The Process

Proposed amendments to the Rules of the North Carolina State Bar are published for comment in the *Journal.* They are considered for adoption by the council at the succeeding quarterly meeting. If adopted, they are submitted to the North Carolina Supreme Court for approval. Amendments become effective upon approval by the court. **Unless otherwise noted, proposed additions to rules are printed in bold and underlined, deletions are interlined.**

The proposed amendments provide for an increase to the fee charged to sponsors and attendees of approved CLE courses (to $3.00) to support the activities of the Chief Justice's Equal Access to Justice Commission. A portion of the increase ($0.25) will be retained by the State Bar to defray its costs for the collection of and accounting for the fee.

Proposed Amendments to the Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

To incentivize timely submissions, the proposed amendment imposes a $25.00 late fee for delinquent applications for continuous certification (recertification).

Proposed Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Revised Rules of Professional Conduct, Rule 1.15, Safeguarding Property

The proposed amendment deletes the term "credit union" from the definition of what is considered a "bank" because the deposits of clients held in a credit union trust account are not covered by federal deposit insurance unless the clients are themselves members of the credit union.

Proposed Amendments

At its meeting on July 24, 2009, the council received the report of the Ethics Committee on proposed amendments to the Preamble, Rule 1.8 and Rule 3.8 of the Rules of Professional Conduct which were originally published for comment in the Spring 2009 edition of the *Journal*. The Ethics Committee reported that the proposed amendment to the Preamble was withdrawn by the committee in light of the criticism received; it also reported that the proposed amendments to Rule 1.8 and Rule 3.8 continue to be studied by subcommittees of the Ethics Committee. The council voted to publish the following proposed rule amendments for comment from the members of the Bar:

Proposed Amendments to the Rules on Judicial District Bars

27 N.C.A.C. 1A, Section .0900, Organization of the Judicial District Bars

The proposed amendments provide that judicial district bar dues, like State Bar dues, are not payable during the year of admission to the State Bar by examination, and that lawyers on active military duty are exempt. To avoid undermining the current fiscal year budgets of the various judicial district bars, the proposed amendments will not go into effect for a particular judicial district until the first full fiscal year following the adoption.

.0902 Annual Membership Fee

If a judicial district bar elects to assess an annual membership fee from its active members pursuant to N.C.G.S. 84-18.1(b), the following procedures shall apply:

(a) Notice to State Bar....

(e) Members Subject to Assessment; No Proration; Exceptions. Only those lawyers who are active members of a judicial district bar may be assessed an annual membership fee. No part of the annual membership fee shall be prorated or apportioned to fractional parts of the year, and no part of the membership fee shall be waived for any reason with the following exceptions:

(1) [Effective as of a judicial district bar's first full fiscal year following adoption of this amendment.] A lawyer licensed to practice law in North Carolina for the first time by examination is exempt from payment of the annual membership fee for the judicial district during the fiscal year in which the lawyer was admitted to practice law;

(2) [Effective as of a judicial district bar's first full fiscal year following adoption of this amendment.] A member serving in the armed forces, whether in a legal or nonlegal capacity, is exempt from payment of the annual membership fee for any fiscal year in which the member is on active duty in the military; and

(3) A lawyer who joins a judicial district bar after the beginning of its fiscal year shall be exempt from the obligation to pay the annual membership fee for that fiscal year only if the lawyer can demonstrate that he or she previously paid an annual membership fee to another judicial district bar with a fiscal year that runs coterminously, for a period of three (3) months or more, with the fiscal year of the lawyer's new judicial district bar.

(f) Hardship Waivers....

Proposed Amendments to the Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals, and Section .0200, Continuing Paralegal Education

Recommended by the Board of Paralegal Certification, the proposed amendments make the following changes to the rules governing the State Bar's program to certify paralegals: (1) recognize that a juris doctor degree from an ABA-accredited law school satisfies the educational requirements for certification; (2) substitute the correct names for the organizations formerly known as the North Carolina Academy of Trial Advocates and the North Carolina Bar Association Legal Assistants Division; and (3) prohibit continuing paralegal education (CPE) credit for self-study except for courses taken online.

.0119 Standards for Certification of Paralegals

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) Education. The applicant must have earned one of the following:

(A) an associate's, bachelor's, or master's degree from a qualified paralegal studies program; ~~or~~

(B) an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Department of Education and a certificate from a qualified paralegal studies program; or

(C) a juris doctorate degree from a law school accredited by the American Bar Association.

(2) Examination. ....

.0105 Appointment of Members; When; Removal

(a) Appointment....

(b) Procedure for Nomination of Candidates for Paralegal Members.

(1) Composition of Nominating Committee. At least 60 days prior to a meeting of the council at which one or more paralegal members of the board are subject to appointment for a full three year term, the board shall appoint a nominating committee comprised of certified paralegals as follows:

(i) A representative selected by the North Carolina Paralegal Association;

(ii) A representative selected by the North Carolina Bar Association ~~Legal Assistants~~ Paralegal Division;

(iii) A representative selected by the North Carolina ~~Academy of Trial Lawyers~~ Advocates for Justice Legal Assistants Division;

(iv) Three representatives from three local or regional paralegal organizations to be selected by the board; and

(v) An independent paralegal (not employed by a law firm, government

Comments

The State Bar welcomes your comments regarding proposed amendments to the rules. Please send your written comments to L. Thomas Lunsford II, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611.

entity, or legal department) to be selected by the board.

(2) Selection of Candidates. ....

.0202 Accreditation Standards

The Board of Paralegal Certification shall approve continuing education activities in compliance with the following standards and provisions.

(a) ....

(c) A certified paralegal may receive credit for continuing education activities ~~where~~ **in which** live instruction ~~is used~~ or ~~mechanically or electronically~~ recorded ~~or reproduced~~ material is used~~;~~ **. Recorded material includes** ~~including~~ videotaped or satellite transmitted programs**, and programs on CD-ROM, DVD, or other similar electronic or digital replay formats**. A minimum of three certified paralegals must register to attend the presentation of a **replayed** prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment.

(d) A certified paralegal may receive credit for participation in a course ~~on CD-ROM or~~ online. ~~A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer.~~ An online course is an educational seminar available on a provider's website reached via the internet. To be accredited, a computer-based ~~CLE~~ CPE course must be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

(e) ....

Proposed Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct

The addition of a new rule on pro bono service is proposed. Unlike the majority of jurisdictions, the North Carolina Rules of Professional Conduct do not contain a rule declaring that a lawyer has a professional responsibility to render pro bono legal services. The proposed rule, like the rules in the other jurisdictions, is not mandatory and sets forth only an aspiration goal for each lawyer of at least 50 hours of pro bono work annually. It is believed that the inclusion of a rule on voluntary pro bono service will elevate the importance of the duty of pro bono service and help recruit more lawyers to address the gap in the provision of legal services to the indigent and to worthy public service enterprises. ***The entire rule is new and, therefore, it is not shown in bold print.***

Proposed Rule 6.1, Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to:

(1) persons of limited means;

(2) charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means; or

(3) individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights, or charitable, religious, civic, community, governmental, and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

(b) provide any additional services through:

(1) the delivery of legal services described in paragraph (a) at a substantially reduced fee; or

(2) participation in activities for improving the law, the legal system, or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The North Carolina State Bar urges all lawyers to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] The critical need for legal services among persons of limited means is recognized in paragraphs (a)(1) and (2) of the rule. Legal services to persons of limited means consists of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making, and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers, and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraph (a). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations described in paragraphs (a)(2) and (3).

[5] Constitutional, statutory, or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility

by performing services outlined in paragraphs (a)(3) and (b)(2).

[6] Paragraph (a)(3) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural, and religious groups.

[7] Paragraph (b)(1) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(2) recognizes the value of lawyers engaging in activities that improve the law, the legal system, or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator, or an arbitrator, and engaging in legislative lobbying to improve the law, the legal system, or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[10] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[11] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

[12] Lawyers are encouraged to report pro bono legal services to Legal Aid of North Carolina, the North Carolina Equal Access to Justice Commission, or other similar agency as appropriate in order that such service might be recognized and serve as an inspiration to others. ■

LAP (cont.)

Still, many of us do not feel emotionally pulled to make a meaningful commitment to a meditation practice, even if we realize it would be very beneficial to us to develop our attention in this way. Short of that, the best way to learn to step out of our emotional reactive patterns is to develop the skill of self observation so that we can see when the patterns are first triggered. Most of the time we are not aware of what our automatic reactive emotional patterns are until they have been triggered and the energy they release has run its course. This means our awareness only comes when we are in the latter stage of the emotional reactive pattern, e.g., we are already feeling the resentment or expressing anger that somebody has been late. With a little diligent self-observation one can back the process up so that we become aware when we first have a feeling, or bodily sensation that might lead to an emotional reactive pattern. At that stage we can consciously choose to stay focused right in the present and experience the passing of the emotion or feeling without getting caught in it. Like all skills, the skill of self-observation is one that simply takes practice. But it will produce very helpful results.

Once we learn to intervene in the emotional reactive pattern at an earlier stage—before we get caught in the energy of anger or resentment—we can be more present to what the situation is right in the moment and have many more options about how we will experience what is occurring and, even more importantly, how we will respond. It is this freedom of experience in the moment that seems to bring with it a certain intelligence; when we are not caught in our reactive patterns and we are at a much higher level of choice. What this means in practicing law and working with our partners and clients is that we're in a much more creative place to solve problems and find new solutions because we're not caught in an emotional reactive pattern. We are able to experience the problem that is before us more directly and, therefore, find new ideas and solutions.

The intelligence of being present in our lives is something that is not only practiced in traditional Buddhist psychology, but also in contemporary ways that promote healing. One of the "promises" of Alcoholics Anonymous is that upon working the 12 steps of AA, the recovering person will "intuitively know how to handle situations that used to baffle us." Part of the process provided by the steps is for us to understand the emotional reactive patterns that grew up around the development of dependency on alcohol. As we go through the recovery process, set out in the steps, we develop the ability to self-observe the emotional reactive patterns that are part of the disease. Included in the steps is a process of making amends where our emotional reactive patterns have caused harm to others. The end result is that, despite whatever difficulties we have been through, we learn not to regret the past or fear the future. In other words, we learn to be more present. When we are free of emotional reactive patterns (or at least know how to prevent them from cascading), we are in the intelligence of presence where what used to baffle us no longer does.

When we are feeling tired after a long day, if we can be fully present to our own tiredness, we will see that we do not contract and remain more open to our experience. Given all of the pressures on us as lawyers these days—the economic pressures, the technological distractions, and the ever-present time pressures—practicing our ability to be present and open in our lives is a way to enhance our enjoyment of our profession and increase the depth of our relations with our colleagues and family. ■

The Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers which helps lawyers address problems of stress, depression, addiction, or other problems that may lead to impairing a lawyer's ability to practice. If you are a lawyer, judge, or law student and would like more information, go to www.nclap.org or call toll free: Don Carroll (Charlotte and areas West) at 1-800-720-7257, Towanda Garner (Piedmont area) at 1-877-570-0991, or Ed Ward (Raleigh and down East) at 1-877-627-3743. Don is the author of A Lawyer's Guide to Healing, *published by Hazelden.*

Grievance Committee and DHC Actions

Disbarments

Spruce Pine lawyer **Randy A. Carpenter** was disbarred by the DHC. Carpenter engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation by preparing and submitting HUD-1 Settlement Statements that falsely represented the receipt and disbursement of funds in over 300 real estate closings in the Village of Penland project. The DHC found that by closing transactions in which he knew the lenders had received false information, Carpenter facilitated a conspiracy to defraud the lenders.

Raleigh lawyer **Joseph W. Dean** was disbarred by the Wake County Superior Court. Dean knowingly participated in and facilitated multiple fraudulent real estate transactions.

Matthew A. Marino of Matthews was disbarred by the State Bar Council. Marino pled guilty in federal court to misprision of a felony for concealing and failing to report his knowledge of a fraudulent investment scheme. Marino was sentenced to 21 months in prison and ordered to pay restitution of $60,000,000.

Rick F. Shumate of Greensboro was disbarred by the DHC. Shumate pled guilty in federal court to the felony offense of making a false statement to a federal agent in violation of 18 U.S.C. § 1001(a)(2). Shumate also engaged in conduct involving deceit and misrepresentation by making false certifications in preliminary opinions of title, preparing and submitting HUD-1 Settlement Statements that falsely represented receipt and disbursement of funds, and closing loans for the same borrowers to purchase multiple primary residences.

Suspensions & Stayed Suspensions

The DHC suspended **Barry Snyder** of Greensboro for two years for violating rules regarding handling entrusted funds. An audit did not show misappropriation. The suspension is stayed for two years upon compliance with multiple conditions.

Scott Zimmerman of Chapel Hill was suspended for three years by the DHC. The suspension is stayed for three years on numerous conditions. Zimmerman engaged in deceit by accepting direct payment of fees rather than routing them through his firm so they could be properly accounted for. Zimmerman was entitled to 100% of the fees and did not embezzle from the firm. Zimmerman also pled no contest to a criminal charge for possession of cocaine and violated mandatory safeguards when he borrowed money from a client.

Karen Zaman of Charlotte and Chapel Hill was suspended for two years by the DHC. The suspension is stayed for three years. Zaman failed to attend discovery conferences, failed to supervise an assistant, failed to communicate with a client, and engaged in a conflict of interest. Conditions of the stay include completion of a law office management course and supervision by a law practice monitor.

Disability Inactive Status

No lawyers were transferred to disability inactive status this quarter.

Censures

Eric Levine of Charlotte was censured by the Grievance Committee for failing to prosecute a personal injury case. When the case was dismissed after 28 months, Levine had done nothing other than collect medical records.

Reprimands

Joseph Anderson of Winston-Salem was reprimanded by the Grievance Committee as reciprocal discipline. Anderson was reprimanded by the Supreme Court of Kentucky for advertising violations and failing to properly supervise an assistant.

Greensboro lawyer **Max Ballinger** was reprimanded by the DHC. Ballinger engaged in conduct prejudicial to the administration of justice by sending letters asking judges to reopen issues previously resolved by agreement, refusing to sign a consent judgment to which the parties had agreed, and arguing for a consent judgment to which the parties had not agreed.

Reidsville lawyer **Eunice Jones-Obeng** was reprimanded by the Grievance Committee for violations of her fiduciary duties in handling funds entrusted to her as escrow agent and for failing to disburse escrowed funds promptly in compliance with a court order.

George W. Kane of Raleigh was reprimanded by the Grievance Committee. Kane notarized signatures of a client who was not present and did not sign the documents.

Ryan Shoaf of Raleigh was reprimanded for making misleading statements to the Grievance Committee.

Robert Spaugh of Winston-Salem was reprimanded by the Grievance Committee for neglecting and failing to communicate with his client and failing to respond to the Bar.

Durham lawyer **Cheri Patrick** was reprimanded by the Grievance Committee for failing to respond to her client's requests for an accounting, failing to refund an unearned fee, incorrectly depositing entrusted funds into her operating account, and failing to reconcile her trust account at least quarterly.

Petitions for Reinstatement

Georgina M. Mollick of Raleigh was reinstated to active status on June 11, 2009. In March 2004, following her guilty plea to the felony of misprision of felony, the DHC suspended her license to practice law for five years.

Valarie L. Perkins of Greensboro petitioned the DHC for reinstatement to active status. Perkins was suspended for two years in April 2005 for making misleading statements about her legal services, misrepresenting her legal experience, failing to communicate with clients, and failing to respond to the Bar. A hearing has not been scheduled. ■

Law School Briefs

All of the law schools located in North Carolina are invited to provide material for this column. Below are the submissions we received this quarter.

Elon University School of Law

Charter class of Elon Law receives JD degrees—At Elon University School of Law's inaugural commencement exercises, held May 24, 107 members of the charter class received their degrees, marking a major milestone for the school founded on the principle that a legal education should prepare students to be not only excellent lawyers, but also leaders in their communities.

David Gergen, adviser to four United States Presidents, director of the Center for Public Leadership at the Harvard Kennedy School, and chair of Elon's Law School Advisory Board, delivered the commencement address, saying, "All of you have shown us your wisdom, your courage, your service to others, and your dedication to leadership. What we ask of you now is to remember who you are and remember to give back, and we will all remain proud of you for the rest of our lives." Read more at law.elon.edu/charterclass

Elon Law professor Andrew Haile calls for clarity in NC corporate tax system—In a May 29 column published in the Triad, Triangle, and Charlotte editions of *The Business Journal*, Andrew Haile examines a recent decision of the North Carolina Court of Appeals that "introduced further uncertainty into North Carolina's already complicated corporate tax system." In the article, Haile identifies ambiguities created by the court's reasoning, related to when multistate corporations should file taxes as separate entities or through a combined return. Visit law.elon.edu for more details.

Elon Law professor Howard Katz co-authors book on teaching strategies for law professors—Howard Katz has coauthored *Strategies and Techniques of Law School Teaching*, a book that provides detailed and comprehensive advice on how to plan, design, and teach law school courses effectively. Aspen Publishers will distribute the book annually to new law professors nationally. Visit law.elon.edu for more details.

University of North Carolina School of Law

Commencement—UNC School of Law graduated 227 students at its May 2009 commencement ceremony. Former US Attorney General Michael Mukasey spoke at the event, and Henry Brandis Professor of Law Kenneth S. Broun was presented with the Frederick B. McCall Teaching Award.

US News & World Report rankings—UNC School of Law rose eight places in the rankings of America's Best Graduates Schools in *US News & World Report*. Now ranked at #30 overall, with reputation rankings at 17th nationally by lawyers/judges, and 20th nationally by scholars.

Education—The Center for Civil Rights co-hosted a policy briefing with UCLA's Professor Gary Orfield on Capitol Hill on June 12, examining policy options to promote racially integrated public school education.

CLE programs—The school recently hosted the J. Nelson Young Tax Institute. Upcoming programs include Dan K Moore Program in Ethics, October 16, and the Shape of the Coast, October 23.

Summer initiatives for students——The school designed and funded a series of special programs to help ease the summer employment difficulties students are experiencing during this challenging economy, including special summer research assistantships, center-based fellowships, and internships with non-profit entities, paid for by UNC Law stipends; and 29 private firm opportunities in North Carolina that resulted from special pleas to alumni for assistance. UNC Law is also providing bar fee grants to graduating students, and has increased the offerings of skills and career training programs to help students bolster their summer employment skills.

Poverty in North Carolina—The Center on Poverty, Work, and Opportunity hosted "Poverty and the Recession in North Carolina: Challenges and Opportunities" in April, featuring a keynote address from the Honorable Joe Hackney, speaker of the NC House of Representatives, and an address by the Honorable Brad Miller, US Representative for the 13th District of North Carolina.

Immigration—Students in the UNC Clinic on Immigration/Human Rights released studies about the policies and politics of the local enforcement of 287(g) and about the Interrogation and Detention Reform Act of 2008. Clinic director Deborah Weissman testified about 287(g) policies at a congressional hearing held jointly by the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, and the Subcommittee on Immigration, Refugees, Border Security, and International Law.

North Carolina Central University School of Law

Speakers—United States Supreme Court Chief Justice John G. Roberts, Jr. presided over a moot court competition at the school of law on April 14, as part of the law school's Discourse Contemporary Legal Issues Speakers Series. He was joined on the bench by former NCCU law professor and Fourth Circuit Court of Appeals Judge Allyson Duncan and retired justice of the North Carolina Supreme Court Henry Frye. The chief justice presided over the proceeding at the request of NCCU School of Law Dean Raymond C. Pierce.

Other distinguished speakers in this series include the Honorable Kenneth W. Starr, judge for the United States Court of Appeals, DC Circuit and current dean of Pepperdine University School of Law; and the honorable Harry T. Edwards, senior circuit judge, chief judge emeritus, United States Court of Appeals, DC Circuit.

Barbara Arnwine, Executive Director of the Lawyer's Committee for Civil Rights Under the Law, was the Keynote Speaker for the First Annual Civil Rights Symposium on Friday, March 27, 2009. The symposium

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Attorneys Honored with Distinguished Service Awards

The recently-created North Carolina State Bar Distinguished Service Award program honors current and retired members of the North Carolina State Bar who have demonstrated exemplary service to the legal profession.

Stephen "Luke" Largess

Stephen "Luke" Largess, a Charlotte practitioner, is a recipient of the State Bar's Distinguished Service Award. Luke graduated cum laude from Duke University and earned his law degree from UNC School of Law. He became a member of the North Carolina State Bar in 1990, and practiced for 18 years with the firm of Ferguson Stein Chambers. He has done trial and appellate work in state and federal courts in the fields of education, employment, civil rights, criminal defense, personal injury, and medical negligence. His work at Ferguson Stein Chambers included representing the class of black families in the trial and appeal of the historic Charlotte school desegregation case originally captioned *Swann v. Charlotte Mecklenburg Board of Education.* Luke recently began working at the law firm of Tin, Fulton, Walker, & Owen in Charlotte.

While Luke was still in law school at Carolina, he helped found the North Carolina Legal Education Assistance Foundation (NC LEAF), the nation's first state-wide loan forgiveness program to assist public service lawyers with student loan debt. He received the Student Pro Bono Award from the North Carolina State Bar for this outstanding accomplishment. In the nearly 20 years since NC LEAF's inception, Luke has continued to lead the organization, volunteering countless hours as the president of the NC LEAF Board. By helping found and grow NC LEAF, which now provides $750,000 annually to public interest attorneys, Luke has enabled lawyers to pursue careers in public service, thereby serving the public of North Carolina and enhancing the quality of legal services available to the indigent. In addition to his dedicated work with NC LEAF, Luke has also served on the board and legal committee of the ACLU of North Carolina and the NC Justice Center.

James M. Deal Jr.

James M. Deal Jr., who practices in the areas of trusts and estates, business law, and real estate with the law firm of Deal, Moseley & Smith in Boone, is a recipient of the State Bar's Distinguished Service Award. Jim graduated from Appalachian State University with honors and received his law degree from UNC School of Law. During his 35 years of practice in Watauga County, he has been a model member of the bar and a dedicated servant of the community.

In addition to his service as Watauga County attorney, Jim was a member of the Watauga County School Board for 12 years before being elected to the Board of County Commissioners in 2004. Once elected, he was selected by his fellow commissioners to chair the Board of Commissioners. As commissioner, Jim led the county in the construction of a much-needed new high school. The community's initial plan had been to renovate the existing building, but Jim's vision was for a new building that would meet the needs of the growing community. He was instrumental in the county's acquisition of a 90-acre tract of land for the new school and has implemented a broadly accepted plan for financing the project. Jim has also chaired the Board of Trustees for his alma mater, Appalachian State University, and served numerous community organizations.

Jim served as president of the Watauga County Bar Association and the 24th Judicial District from 1979 to 1980. He serves as a mentor to other attorneys in his local bar, where he leads by example and promotes professionalism and civility among members of the bar. Peers describe Jim as "dedicated . . . to providing excellence in our profession."

Gerald F. White

Gerald F. White, a recently retired lawyer from Elizabeth City, is a recipient of the State Bar's Distinguished Service Award. After two years of honorable service in the US Navy, Gerald graduated magna cum laude from Wake Forest College in 1949 and then first in his class from Wake Forest Law School in 1952.

Gerald's active 50-plus-year practice began with three years with the Attorney General's Office in Raleigh. Gerald then moved to Elizabeth City and opened his office on Main Street, where he practiced for the remainder of his career. Gerald is known among his peers for his keen and analytical mind and his disarming wit and sense of humor.

Gerald has always been an eager participant in many civic and professional groups and has been recognized numerous times for his dedicated service to his community and to the legal profession. He served on the Pasquotank County Social Services Board and is a trustee of the First Baptist Church. He has been a member of the Elizabeth City Chamber of Commerce, served as its president, and was awarded its Presidential Citation. He served as president of the Farmers Bank of Sunbury and First Citizens Bank, and was a member and chair of the College of Albemarle Board of Trustees. Gerald also served on the Campbell University Board of Trustees as a member and its director and has been awarded the Campbell University Presidential Medallion. He has been president of the Elizabeth City Lions Club and received the Lion of the Year Plaque and Citation.

Gerald demonstrated his dedication to improving the legal profession by, among other things, serving as a State Bar Councilor for nine years. Gerald was also inducted into the NC Bar Association's General Practice Hall of Fame in 1997.

James F. Morgan

James F. Morgan, a High Point native and practitioner with the firm of Morgan, Herring, Morgan, Green, & Rosenblutt, LLP, is a recipient of the State Bar's Distinguished Service Award. Jim attended Guilford College and became a member of the North Carolina State Bar in 1969, after receiving his law

degree from Cumberland School of Law in Birmingham, Alabama. In his 40-year career, Jim has handled many types of cases, including personal injury, wills and probates, and zoning and governmental relations.

In addition to his law practice, Jim represented Guilford County in the North Carolina House of Representatives from 1977-1982 and has held the position of president or chairman of no fewer than 50 organizations and boards. One of Jim's most recognized public service achievements is his leadership in establishing the High Point Community Foundation, of which he was founding chairman from 1990 to 2003. His extraordinary commitment to serving his community has garnered him numerous accolades and awards, including Young Man of the Year for High Point, Legislator of the Year (selected by four different organizations), High Point University Distinguished Service to Community Award, High Point Human Relations Humanitarian of the Year, Guilford College Alumni Excellence Award, and Distinguished Alumni of the Year from the Cumberland School of Law.

Throughout his career Jim has served the legal profession in a wide variety of ways. In the 1970s, he worked to provide legal services to under-served and indigent populations by chairing the High Point Legal Services Board and the NC Commission on Legal Aid in North Carolina. He was president of the High Point Bar Association and the 18th Judicial District Bar from 1995 to 1996, and was chairman of the NC Council of Bar Presidents from 1999 to 2000. In 1999 he received the NC Bar Association's Centennial Award and he was recognized with the I. Beverly Lake Public Service Award in 2006. Jim also served on the Citizen Lawyer Committee of the NC Bar Association from 2007 to 2008 and has provided pro bono legal services to over 60 nonprofit organizations seeking to incorporate.

William A. Johnson

William A. Johnson, a lawyer and Lillington native, is a recipient of the State Bar's Distinguished Service Award. Bill graduated from UNC School of Law in 1944 and practiced in Lillington for the next 15 years. He then served for three years as the NC Commissioner of Revenue and for two years as a superior court judge, before returning to the practice of law in Lillington in 1967. He has continued to practice in his hometown ever since.

Bill's strong commitment to service is evident in his many civic leadership roles and his overall dedication to elevating the legal profession. He has been a member of the Harnett County Board of Education, president of the Lillington Chamber of Commerce, chairman of the Harnett County Democratic Party Executive Committee, member and chairman of the UNC Board of Governors, vice-president of Campbell University's board, and a member of the North Carolina Education Council.

In his more than five decades of practicing law, Bill has served as city attorney for Lillington, county attorney for Harnett County, superior court judge for the 11th District, and as counsel for the North Carolina Railroad and Campbell University. He has been a leader in the legal profession, acting as president of both the Harnett County Bar Association and the 11th Judicial District Bar Association, and serving as a State Bar Councilor from 1972 to 1979. He co-chaired the NC Bar Association's Eleventh Judicial District Voter Education Project, was a member of the North Carolina Constitutional Study Commission, and was a member of the North Carolina Judicial Nominating Committee. Bill is also a member of the Board of Advisors of the UNC Center for Civil Rights.

James M. Kimzey

James M. Kimzey of Brevard is a recipient of the State Bar's Distinguished Service Award. Jim was a Morehead Scholar at UNC-Chapel Hill and graduated with honors from UNC's Law School in 1964. Jim began his practice in Asheville in the area of transactional law and then moved to Raleigh where he practiced utilities, administrative, criminal, and domestic law.

Even before the Equitable Distribution Act was passed, Jim believed that wives were entitled to competent representation and handled many domestic cases, distinguishing him as one of the few lawyers willing to help the wives of powerful men. When Jim later focused his practice on commercial litigation, he again distinguished himself as one of only a small number of North Carolina lawyers willing to litigate against the banks which had made large commercial loans to his clients. Jim moved back to his hometown of Brevard in 1995 and opened his still-active solo general practice.

Jim's commitment to the legal profession is evident in his active participation in many professional organizations. He is a member of the American Bar Association, the American Judicature Society, and the North Carolina Advocates for Justice He has been a member of the North Carolina Bar Association his entire career, serving as chairman of the Young Lawyers Division from 1970 to 1971, and participating in the administrative law, litigation, and general practice sections. Jim was a member of the Wake County Bar Association from 1965 through 1995 and has been a member of the Transylvania Bar Association since 1995. He was elected to serve as a North Carolina State Bar Councilor in 1992, and he co-chaired the State Bar's committee to implement a statewide fee dispute resolution program. Jim was also instrumental in creating the Wake County Bar's local grievance and fee dispute resolution programs. ■

Law School Briefs (cont.)

covered Civil Rights in the 21st Century: Identifying the Issues and Providing Solutions.

Rankings—*National Jurist* March 2009 ranked NCCU School of Law the 7th most diverse faculty.

Client Counseling Competition—The North Carolina Central University School of Law hosted the American Bar Association (ABA) Law Student Division National Competition on March 13 and 14, 2009. Eighty local attorneys, clinicians, and students volunteered as judges and clients for the competition. NCCU hosted 15 teams from across the US and Canada in this competition.

Public interest judicial clerkship stipend—In an effort to assist students in securing judicial clerkships as well as public interest employment after graduation, the law school will award stipends to first-and second-year students who secure positions in these two areas for the summer of 2009. ■

Fox Nominated as Vice-President

Winston-Salem attorney James R. (Jim) Fox was selected by the State Bar's Nominating Committee to stand for election to the office of vice-president of the North Carolina State Bar. The election will take place in October at the State Bar's annual meeting.

In 1968, Mr. Fox earned an AB degree in History from Duke University, and his JD from Duke University School of Law in 1971. He was admitted to the practice of law that same year. At that time, he began work with Howrey & Simon in Washington, DC. In 1984 he returned to North Carolina and began to practice with the Winston-Salem firm of Bell, Davis & Pitt, and now works at Pike Electric in Mount Airy.

Fox has substantial involvement in local and state bar organizations. He served as chair of the State Bar's Disciplinary Hearing Commission, as chair of the Bar Association's Trial Practice Curriculum Committee, as a member on the Executive Committee of the Bar Association's Litigation Section, and as vice-president of the Forsyth County Bar Association. While on the State Bar Council, Fox chaired the Grievance Committee, Statute of Limitations Study Committee, and Special Disciplinary Guidelines Committee, and was vice-chair of the Authorized Practice Committee. He has also served on the Special Committee on Real Property Closings, Emerging Issues Committee, Executive Committee, Program Evaluation Committee, and Disciplinary Review Committee.

Mr. Fox is also active in numerous civic organizations including the Winston-Salem Drug-Free Workplace Task Force, the executive board of Contact Hopelines of the Triad, the Board of Directors of the Winston-Salem West End Association, and Duke Law School's Alumni Council and Order of Barristers. ■

Featured Artist—Wendy Musser

High Tide on the Marsh

Wendy Musser is a North Carolina native, born in Greensboro. Though she occasionally ventures into mixed media, acrylic and pastel landscape painting has been her primary focus. Her education includes obtaining an Associate of Arts Degree from Peace College, and a Bachelor of Fine Arts Degree from the University of North Carolina at Greensboro. Returning to school, she completed a second major in Interior Design at Meredith College.

Her career includes positions as a technical illustrator, a manual and CAD draftsperson, a picture framer, and an interior designer. She is a commercial interior design consultant and is the owner of Starry Night Art and Frame. Professional accomplishments include the passing of the National Certification for Interior Design Qualification and professional membership in the International Interior Design Association.

Musser studied painting under Mary Anne K. Jenkins since 1995 and has recently studied plein air pastel painting with Kevin Beck. She is a member of the Fine Arts League of Cary and the Durham Arts Guild. She has been accepted in and received awards in juried shows in the Triangle Area since 1997. ■

Each quarter, the works of a different contemporary North Carolina artist are displayed in the storefront windows of State Bar building. The artworks enhance the exterior of our building and provide visual interest to pedestrians passing by on Fayetteville Street. The State Bar is grateful to The Collectors Gallery, the artists' representative, for arranging this loan program. The Collectors Gallery is a full service gallery that represents national, regional, and North Carolina artists, and provides residential and commercial consulting. Readers who want to know more about an artist may contact Rory Parnell or Megg Rader at TCG, 323 Blake Street, Raleigh, NC 27601 (919.828.6500).

Client Security Fund Reimburses Victims

At its July 23, 2009, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $68,523.70 to nine clients who suffered financial losses due to the misconduct of North Carolina lawyers. The board also reconsidered one matter that it previously had conditionally approved. The board received information on five claims filed against Michelle Shepherd pursuant to an expedited process adopted by the board in July 2008 in which its counsel could approve reimbursement of title insurance premiums retained by Shepherd that were never paid to a title insurance company. The five expedited claims paid since the last board meeting total an additional $2,231.50.

At its meeting in January 2009, the board conditionally approved reimbursement of $7,000.00 to a former client of Charles Alston Jr. of Charlotte if the client provided proof that the money the client borrowed to pay to Alston was delivered to Alston. The board reconsidered the matter and denied the claim.

The new payments authorized were:

1. An award of $19,400.00 to a former client of Charles Alston Jr. of Charlotte. The board found that Alston was retained to represent the client on criminal charges. Alston failed to provide any valuable legal services for the fee paid. Alston was disbarred on October 2, 2008.

2. An award of $450.00 to a former client of Charles Alston Jr. The board found that Alston was hired to handle traffic citations. Alston failed to provide any valuable legal services for the fee paid. The board has now reimbursed 11 Alston clients a total of $37,447.30.

3. An award of $5,149.00 to a former client of Roger Cardinal of Charlotte. The board found that Cardinal handled a real estate closing for a client. Cardinal failed to make all the proper disbursements from the closing proceeds. Cardinal's trust account balance was insufficient to pay all his clients' obligations due to his misappropriation. Cardinal was disbarred on December 26, 2008. The board previously reimbursed one other Cardinal client a total of $424.00.

4. An award of $1,013.91 to former clients of Roger Cardinal. The board found that Cardinal handled a refinance closing for the clients. The check Cardinal sent to the clients for the excess proceeds failed to clear before the State Bar froze Cardinal's trust account due to his misappropriation.

5. An award of $1,163.80 to a former client of Roger Cardinal. The board found that Cardinal handled a real estate closing for a client. Cardinal failed to make all of the closing disbursements prior to the State Bar freezing his trust account due to his misappropriation.

6. An award of $25,000.00 to a former client of Roger Cardinal. The board found that Cardinal was retained to handle a real estate closing for a client and held some funds in escrow as a deposit on the property. The deposit was frozen in Cardinal's trust account by the State Bar after it was discovered that Cardinal had misappropriated funds from his trust account.

7. An award of $1,000.00 to a former client of Roger Cardinal. The board found that Cardinal was retained to handle a real estate closing for a client and held some funds in escrow as a deposit on the property. The deposit was frozen in Cardinal's trust account by the State Bar after it was discovered that Cardinal had misappropriated funds from his trust account.

8. An award of $691.00 to a former client of Roger Cardinal. The board found that Cardinal handled a real estate closing for a client. Cardinal failed to make all the proper disbursements from the closing proceeds.

9. An award of $14,656.80 to a former client of David Smith of Durham. The board found that Smith was retained to handle a workers' compensation matter for a client. Smith failed to timely depose his client's treating physician to determine whether the physician could support a higher disability rating than the defendants' expert. Due to Smith's neglect, an order was entered resolving the disability issue at the defendants' rating. When Smith received a check from counsel for the defendants, he deposited it into his trust account and sent his client a trust account check. When the check was presented for payment, Smith's trust account balance was insufficient to pay the check due to misappropriation. ■

IOLTA Update (cont.)

comparability now so it will be in place when the rate climate improves and we can significantly increase the funds available for ensuring equal access to justice.

This report was presented to the IOLTA trustees and the NC State Bar Issues Committee during the April State Bar meeting. IOLTA leadership and staff have worked with State Bar leadership and staff in taking the following next steps:

1) An IOLTA rule revision that includes comparability requirements was drafted using resources available at the ABA Commission on IOLTA, which collects and reviews IOLTA rules and can comment on best practices.

2) We began a dialogue with the NC Bankers Association and are providing information to the association regarding comparability.

3) We are continuing to educate the bar about the concept.

More information on comparability (answering frequently asked questions) is available on the NC State Bar website, www.ncbar.gov. ■

The North Carolina State Bar and Affiliated Entities

Selected Financial Data

The North Carolina State Bar

	2008	2007
Assets		
Cash and cash equivalents	$3,843,692	$3,585,545
Property and equipment, net	1,884,534	1,901,500
Other assets	211,595	153,146
	$5,939,821	$5,640,191
Liabilities and Fund Equity		
Current liabilities	$3,201,650	$3,421,682
Long-term debt	384,634	477,338
	3,586,284	3,899,020
Fund equity-retained earnings	2,353,537	1,741,171
	$5,939,821	$5,640,191
Revenues and Expenses		
Dues	$5,827,813	$4,985,963
Other operating revenues	646,596	517,086
Total operating revenues	6,474,409	5,503,049
Operating expenses	(5,963,454)	(5,715,583)
Non-operating revenues	101,411	106,112
Net income (loss)	$612,366	$(106,422)

The NC State Bar Plan for Interest on Lawyers' Trust Accounts (IOLTA)

	2008	2007
Assets		
Cash and cash equivalents	$6,498,043	$5,671,146
Interest receivable	370,896	465,554
Other assets	381,632	364,690
	$7,250,571	$6,501,390
Liabilities and Fund Equity		
Grants approved but unpaid	$4,101,731	$4,123,317
Other liabilities	396,020	375,639
	4,497,751	4,498,956
Fund equity-retained earnings	2,752,820	2,002,434
	$7,250,571	$6,501,390
Revenues and Expenses		
Interest from IOLTA participants, net	$5,087,506	$4,379,518
Other operating revenues	417	882
Total operating revenues	5,087,923	4,380,400
Operating expenses	(4,578,730)	(4,593,857)
Non-operating revenues	241,193	232,322
Net income	$750,386	$18,865

Board of Client Security Fund

	2008	2007
Assets		
Cash and cash equivalents	$1,433,507	$1,739,281
Other assets	2,980	2,375
	$1,436,487	1,741,656
Liabilities and Fund Equity		
Current liabilities	$21,237	$17,812
Fund equity-retained earnings	1,415,250	1,723,844
	$1,436,487	$1,741,656
Revenues and Expenses		
Operating revenues	$592,804	$617,431
Operating expenses	(967,184)	(565,142)
Non-operating revenues	65,786	69,801
Net (loss) income	$(308,594)	$122,090

Board of Continuing Legal Education

	2008	2007
Assets		
Cash and cash equivalents	$460,435	$456,578
Other assets	132,904	136,920
	$593,339	$593,498
Liabilities and Fund Equity		
Current liabilities	38,014	33,292
Fund equity-retained earnings	555,325	560,206
	$593,339	$593,498
Revenues and Expenses		
Operating revenues	$594,590	$576,349
Operating expenses	(618,996)	(526,373)
Non-operating revenues	19,525	18,668
Net (loss) income	$(4,881)	$68,644

Board of Legal Specialization

	2008	2007
Assets		
Cash and cash equivalents	$99,872	$81,249
Other assets	3,701	6,185
	$103,573	$87,434
Liabilities and Fund Equity		
Current liabilities	1,494	1,406
Fund equity-retained earnings	102,079	86,028
	$103,573	$87,434
Revenues and Expenses		
Operating revenues-specialization fees	$102,168	$80,928
Operating expenses	(90,221)	(63,696)
Non-operating revenues	4,104	2,966
Net income	$16,051	$20,198

The Chief Justice's Commission on Professionalism

	2008	2007
Assets		
Cash and cash equivalents	$117,767	$151,992
Other assets	64,612	64,881
	$182,379	$216,873
Liabilities and Fund Equity		
Current liabilities	1,617	-
Fund equity-retained earnings	180,762	216,873
	$182,379	$216,873
Revenues and Expenses		
Operating revenues-fees	$285,830	$302,196
Operating expenses	(327,404)	(315,342)
Non-operating revenues	5,463	5,983
Net loss	$(36,111)	$(7,163)

Board of Paralegal Certification

	2008	2007
Assets		
Cash and cash equivalents	$610,122	$500,008
Other assets	11,875	19,791
	$621,997	$519,799
Liabilities and Fund Equity		
Current liabilities - accounts payable	8,237	6,588
Fund equity-retained earnings	613,760	513,211
	$621,997	$519,799
Revenues and Expenses		
Operating revenues-fees	$250,340	$463,883
Operating expenses	(173,850)	(128,126)
Non-operating revenues	24,059	15,831
Net income	$100,549	$351,588

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